AN EVALUATION OF THE EFFECTIVENESS OF THE FAMILY VIOLENCE INTERDICT

by

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INTRODUCTION

One Woman's Story

Helen[1] and her husband were married in January 1977. A few weeks later her husband began abusing her.

"During my first pregnancy he continuously assaulted me. I at one stage had two blue eyes. He also hit me with a fist on my head and I had to get seven stiches at the hospital . . . In December 1978 he kicked me on my back and I had to go to hospital because I suffered of a slipped disc. I had problems walking.

He used to abuse me verbally, calling me the worst names you can think of. He once said that I am worse than a prostitute.

In 1979 he choked me with the telephone cord and there was this stove cable and he tried to shock me and my baby with it. The people who lived in the back of the house came to my rescue. I ran into the bathroom and drank insecticide because I was totally humiliated and I wanted to die.

After the beatings he always used to apologise and cry, he's so sorry for what he did. He always used to say 'Look what you made me do now.' I was always to blame.

Many times I had to take clothes and go to my parents to get away from the abuse. Once I had to run away from home because he wanted to assault me. I could not take my clothes so he burnt them, my bags, my shoes, he burnt everything.

In 1982 he stabbed me and my sister with a carving knife. We were taken to the hospital and treated for three days. I was one month pregnant at the time. We laid a charge against him and after one year he was given a suspended sentence of three and a half years for five years. This was the only time he was ever found guilty. I was a total loser as far as all the other court cases were concerned."

After the stabbing Helen moved into a house of her own. "He came crying and begging for forgiveness. I took him back for the sake of the children because the one had started school and the second one was on the way.

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1 I interviewed Helen personally for the purposes of this dissertation. In order to protect her privacy and ensure her safety her real name has not been used.

The thing I thing I think that kept me in my marriage was the children. I come from a family where we didn't have any divorce. I was the first one out of my family that ever got divorced and I always thought it's the right thing to stay in the marriage for the sake of the children, the family. My mother always tried to patch things up, whatever happened. I, at one stage, felt that my mother cared more for him than what she did for me, but she was basically just trying to keep the marriage together."

In 1987 Helen did divorce her husband. He continued to brutalise her.

"He once came to my house during the day, stole my set of keys without my maid's knowledge, cut keys for himself and replaced my set of keys. That evening he came into the house while I slept and raped me. I went to the police station the next morning to report it. He was arrested and kept in custody awaiting trial, because this rape case was not the only charge I had against him. There was other assault charges pending. He was acquitted on all the assault charges. On the charge of rape he was acquitted on the grounds of not enough evidence or witnesses. He was then released from prison. The next morning he parked his car at the end of the road in which I lived and as I was leaving for work, he came speeding down the road. When I saw him I tried to run in by the neighbours but he got hold of me and pushed me into the car and drove off. He took me to a deserted place . . . and swore me and said he will show me what he went through in jail.

"One Saturday morning he came to fetch the children. As I opened the door for them to leave, he pulled me out of the house and forced me into his car. He drove to an open veld and raped me right there in the open and assaulted me while the children was sitting in the car. He kicked me in the back and it was so painful I could not move on my own. He put me in the car and drove to the . . . Holiday Inn . . . He booked us into the hotel and he and my eldest son held me on either side to assist me to walk . . . We went into the room and he gave the children money to play games or buy something. When they left he started beating me again. I could not do anything because it was like my back was broken. He hit me so hard and continuously in my face that my eye never healed properly. It is still dark up to today. When the children came back he sent them to buy me a pair of sunglasses to cover my eyes. We left the next morning and I insisted that he take me to see a doctor because I still could not walk on my own. He took me to the doctor who asked what had happened. He said that I fell.

"In December 1988 he came to my house in the morning. I was busy outside and he grabbed me and pushed me into his car. He took me to a deserted place . . . and claimed that the tyre of the car was flat. We got out of the car and he removed the wheel. He took the wheel and threw it at me. I jumped out of the way and because he missed me with the wheel, he took a screwdriver and chased me round the car. He stabbed me twenty times."

Helen was being punished for divorcing her husband.

"He said it was because he wanted to pay revenge for me not wanting him. He also said that if he cannot have me no one will have me. He will either leave me crippled or dead.

I afterwards decided to take this man back, he made my life a misery because I did not want him. We got married again in June 1992."

The abuse continued.

In January 1996, after her husband raped her, Helen tried to obtain an interdict against him in terms of the Prevention of Family Violence Act. The clerk of the Johannesburg Magistrates Court turned her away, saying that she did not qualify for the interdict because she was living with her husband. She tried again and continued to be turned away on spurious grounds. On her fourth attempt the clerk's armoury of excuses began to wear thin and he contradicted himself. He said that she was not eligible for the interdict because she was not living with her husband. (She had by this stage obtained another divorce) Angered, Helen contacted an NGO for assistance and through their intervention she finally secured an interdict in April of 1997. The interdict was served on her ex husband. He was enraged and attempted to abduct her. She managed to escape him and reported violation of the interdict. The Prevention of Family Violence Act requires the police to arrest abusers on breach of the interdict. The police failed to arrest Helen's ex husband. Five months later, despite pressure from NGOs, they still have not done so.

At present Helen lives in a small flat with her young son. (Her husband was granted custody of the two older children in the divorce). He continues to stalk her. Most evenings she gets a police escort into her into her flat as she sees his car parked nearby. Inside she has elaborate security arrangements to keep him from breaking in. She has considered moving to another city but worries that he will track her down. This prospect, without the support from family and friends that presently sustains her, terrifies her. Besides, he has custody of the children. Helen continues to live in fear.

Two things about Helen's story deserve to be emphasised.

The first, in light of the trivialisation that plagues domestic violence, is the severity of the abuse that she has suffered. She has been beaten so that many of her bones have broken. She has been burned, strangled and stabbed. She has been raped. She has spent many weeks in hospital, often in intensive care. She has spent months undergoing physiotherapy. The seriousness of Helen's abuse stands in disquieting contrast to euphemisms like "domestic

squabble" and "tempestuous relationship"[2] that are bandied about in relation to domestic violence.

The second, in light of some uncertainty as to the law's usefulness in relation to domestic violence,[3] is the legal system's failure to assist Helen and its consequent perpetuation of her abuse. Over a period of 19 years the legal system failed continually to protect Helen or punish her husband. It acquitted him of assault charge after assault charge. For attempted murder it handed down only a mild suspended sentence. The law's civil face proved just as toothless. Helen's attempts to obtain an interdict under the Prevention of Family Violence Act were repeatedly thwarted by an incompetent clerk.[4] It took outside intervention for her to receive an audience from a Magistrate and secure an interdict. As Helen says now, she may as well have saved herself the trouble, since the police have not arrested her ex husband for his violation of the interdict. The effect of the law's absence has been to perpetuate Helen's abuse at the hands of her husband. Her husband's arrogance was bolstered to the extent that he punished her for taking legal action against him. Helen was so tightly imprisoned in his brutality that she saw remarriage as her only means of mitigating the severity of the abuse inflicted on her during divorce.

Helen's story is not bizzarely extreme. Domestic violence frequently involves abuse as egregious as that which she has suffered. The South African legal system has a legacy of failing to respond adequately to domestic violence.

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2 Stegmann J described an abusive relationship as "tempestuous" and "stormy" in the recent case of *Robinson v Rossi* [1996] 2 All SA 349 (W) at 366j.

3 Feminists abroad have doubted the usefulness of the law as an mechanism with which to attack women's subordination. See Naffine *Law and the Sexes: Explorations in Feminist Jurisprudence* (1990). In South Africa Joanne Fedler recently expressed the view that " Domestic violence in fact raises the question whether the law is at all suited to traverse the divides, the conflicts and contradictions of human intimacy." Fedler "Lawyering Domestic Violence Through the Prevention of Family Violence Act 1993 - An Evaluation After a Year in Operation" *S A Law Journal* (1995) 231 at 233.

4 The clerk's name is Mr Flynn. He has acquired something of a reputation in Johannesburg for his reluctance to assist survivors in their interdict applications.

Nor is Helen's story an isolated aberration. Domestic violence is rampant in South Africa. While its exact incidence in our country is not known, survey results are alarming: 70% of violence committed nationally is committed in the home; 4 women a week are forced to flee their homes because their lives are endangered;[5] in Gauteng a woman is murdered by her partner every 6 days.[6]

Overall it is estimated that between 1 in 4 and 1 in 6 South African women are survivors of domestic violence.[7]

This paper starts from the premise that the incidence and severity of this scourge, coupled with the legal system's failure to deal adequately with it, make domestic violence an emergency in South Africa.

This is not to suggest that the law is the sole panacea for domestic violence. Domestic violence is a complex social problem demanding combative action across numerous disciplines. The law is however, critically important. Few other institutions boast its capacity to protect, deter and contribute to standard setting. Battered women do turn to the law. When it fails to protect them or punish their abusers, it does not just fail to do this, it condones and perpetuates their abuse. This is painfully evident in Helen's case. The law's absence bolstered her husband's arrogance and abandoned her to his brutality.

In our new constitutional era the legal system can no longer shirk its responsibilities.

Section 12(1)(c) of the Constitution[8] provides that:

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5 *Co-ordinated Action for Battered Women* NICRO, Cape Town (1995).

6 Vetten, *"Women Shot": A Pilot Study Exploring Intimate Femicide* People Opposing Women Abuse (1995).

7 Co- ordinated Action for Battered Women supra n 5; "Violence Against Women in South Africa" *Human Rights Watch Women's Rights Project* (1995) at 2. For statistics on domestic violence in other countries see *Women's Human Rights* Centre for Women's Global Leadership (1990) at 77.

8 Constitution of the Republic of South Africa Act 108 of 1996.

> "[e]veryone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources."

Notably this clause guarantees the right to freedom from violence from both public *and private sources*. It thus obligates the state to take effective legal action against domestic violence.

Since domestic violence arises out of women's social subordination, the state is further obligated by the equality clause enshrined in and foundational[9] to our Constitution, to take combative action against it. Section 9(3) of the Constitution provides that: *

> "[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender [or] sex . . ."

Together these constitutional guarantees place upon the South African state an acute obligation to take effective legal action against domestic violence.

This paper will argue that there are at least three requirements for effective legal action against domestic violence in South Africa. First, such action needs to recognise and respond to the cause of the problem. Second it needs to be imbued with an understanding of, and tailor itself to deal with, the nature of domestic violence. Third it needs to take into account the peculiar exigencies of South Africa, our limited resources being a compelling example.

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9 That our Constitution is founded on the principle of equality is widely accepted. In the recent case of *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC), for example, Mokgoro J held as follows:

> "The South African Constitution is primarily and emphatically an egalitarian constitution. The supreme laws of comparable constitutional states may underscore other principles and rights. But in the light of our particular history and our vision for the future, our Constitution was written with equality at its centre. Equality is our Constitution's focus and organising principle." (at 740I-741A)

In 1993 the National Party enacted the Prevention of Family Violence Act[10] which created a novel interdict procedure specifically tailored to domestic violence. My purpose in this paper is to evaluate its success through examining empirical evidence of its operation against the requirements for effective legal action against domestic violence set out above. In this way I hope to shed some light on the values and pitfalls of the current process and offer some illumination on the way forward.

After the clarification of certain terminology, my paper will be presented in three chapters. Chapter 1 deals with the cause and nature of domestic violence. This complex area merits a thesis in itself. My aim is to do no more than shine a thin light into the darkness in which these issues are normally buried. 1.1 points to the cause of domestic violence as women's oppression in the patriarchal social order generally and the institution of marriage in particular. It is the fact that domestic violence arises out of women's subordination that mandates legal action in terms of our Constitution's equality clause. Conversely, such legal action needs to be founded on the recognition that domestic violence is spawned and sustained by inequality. 1.2 explores the nature of domestic violence and the psychological, social and economic inhibitors that conspire to imprison women in abusive relationships. Legal action against domestic violence needs to be imbued with an understanding of, and tailored to deal with, these inhibitors in order to be effective.

Chapter 2 turns to the law's response to domestic violence. 2.1 begins by considering legal responses to domestic violence in other countries. I wish here to point to the some of the salutary legal strategies developed abroad which respond to the cause and nature of domestic violence. While these offer us a wealth of ideas from which to draw, a note of caution should be sounded. Legal remedies abroad are frequently components in co-operative inter-disciplinary networks against domestic violence. They can therefore not simply be imported into our country and be expected to function effectively in isolation. In order to be effective in South Africa, legal action against domestic violence must be fashioned with our peculiar exigencies in mind.

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10 Act 133 of 1993, hereafter referred to as "the Act."

2.2 focuses on the legal response to domestic violence in South Africa. After noting the meagre legal options traditionally available to battered women in South Africa, I will introduce and outline the interdict procedure under the Prevention of Family Violence Act. I will then discuss the major problems that have bedevilled the process thus far. These are first, a string of procedural difficulties and second, the fact that the interdict has been held to constitute a violation of audi alteram partem.

Chapter 3 examines empirical evidence of the interdict's operation. This was gathered from a sample of 60 women in Gauteng and the Western Cape who completed a questionnaire tracking the interdict process. My questionnaire sought to establish generally whether the interdict is an effective legal remedy. Due however, to much negative evidence,[11] I was not particularly optimistic in this regard and so structured the questionnaire to achieve the following specific goals. First, in the light of evidence that the process is breaking down, I sought to establish whether this is so, and if it is, to isolate the point at which breakdown occurs. Second, in the light of the two judgments which have held the interdict to violate audi alteram partem,[12] I sought to establish how many women are being granted interim as opposed to family violence interdicts,[13] and to examine the implications of this difference. The questionnaire results provide valuable insight into both these issues.

I will bring my paper to its conclusion by evaluating these results against the requirements for an effective legal response to domestic violence and constructing proposals for reform accordingly.

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11 The evidence of the interdict's practical operation that I refer to is drawn from Fedler "Lawyering Domestic Violence" supra n 3; Novitz *Interdicts in the Magistrates' Courts: An Analysis of the Content and Implementation of the Prevention of Family Violence Act* Law, Race and Gender Research Project, University of Cape Town (1994); Clark "Cold Comfort? A Commentary on the Prevention of Family Violence Act" *S A Journal on Human Rights* (1996) 589; South African Law Commission *Discussion Paper 70 Project 100 Domestic Violence* (1997), as well as my own work in the field.

12 This was held in *E Ruitenberg v The Magistrate, Wynberg and R Ruitenberg* unreported case 912/95, Cape Provincial Division and *Robinson v Rossi* [1996] 2 All SA 349 (W).

13 I shall refer to interdicts under the Prevention of Family Violence Act as "family violence interdicts" partly for the sake of convenience and partly for purposes of my arguments later in the paper.

TERMINOLOGY

"Domestic Violence" and "Family Violence"

The terms "domestic violence" and "family violence" imply a violent dispute between two or more blood relatives or members of the same household (depending on how the terms are defined). Yet in the overwhelming majority of cases domestic violence is violence by men against women. The terms "domestic violence" and "family violence" thus obscure both the one sidedness of the violence and the identity of its victims.

I do not intend to enter into the debate about precisely who should be included in the definition of domestic violence for the purposes of legislation. It suffices to say that the paradigm case consists in men directing violence against their intimate female partners and this is what this paper will deal with. The phrase "violence against women in relationships" accurately describes this reality and I shall use it in preference to the terms "domestic violence" or "family violence".

The description "violence against women in relationships" clearly goes beyond marriage. It is now widely accepted in foreign and international law that limiting legal protection against abusive partners to women who are married is arbitrary and discriminatory.[14] "Violence against women in relationships" in this paper thus encompasses all intimate relationships whether partners are dating, cohabiting, separated or divorced.

The term "domestic violence" is hazy as to the precise forms of abuse that it includes. Some use it to refer to physical assault only. Others include threats of assault and sexual and

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14 This is so in many Commonwealth countries, for example, the US, Canada, England and Australia. The United Nations Framework for Model Legislation on Domestic Violence advocates a broad definition of the relationships within which domestic violence occurs. This should include: wives, live-in partners and former wives or girlfriends (including girlfriends not living in the same house). See United Nations Economic and Social Council (Commission on Human Rights) *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences - A Framework for Model Legislation on Domestic Violence* (1996) para 7.

psychological abuse. Still others include economic abuse. The abuse contemplated in this paper may be physical, sexual, psychological, economic or threats of any of these.

"Victim"

In the context of domestic violence (and violence against women more generally), the term "victim" has been the subject of substantial criticism. It tends to stigmatise its subjects as weak thereby perpetuating the notion of their powerlessness. The injustice of violence against women and the enormous strength required to survive it are better captured in the term "survivor". This term not only recognises women's strength, but also inspires hope for the future. It thus serves an empowering function and will be used in this paper in preference to the term "victim."

"Equality"

When used in this paper "equality" embraces a substantive rather than a formal conception of the term.

Formal equality simply prescribes identical treatment for individuals.

> "It presupposes that all persons are equal bearers of rights within a just social order and that inequality is an aberration which can be eliminated by extending the same rights to all in accordance with some 'neutral' norm or standard of measurement."[15]

The reality is that society is characterised by structural disadvantage. Identical treatment in this context may simply perpetuate inequality. Moreover formal equality's "neutral" norm embodies, in truth, the interests and perspectives of the socially privileged. Thus the customary use of the male comparator to determine whether or not women are discriminated

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15 Albertyn and Kentridge "Introducing the Right to Equality in the Interim Constitution" *S A Journal on Human Rights* (1994) 149 at 152.

against. This is particularly problematic in situations, such as violence against women, where there is no comparable male disadvantage.

Substantive equality transcends identical treatment. Unlike formal equality it does not abstract individuals but locates them within their socio economic reality. It recognises that since this reality is characterised by structural group based disadvantage, identical treatment may simply reinforce inequality. More proactive preferential measures may be necessary to combat entrenched disadvantage. Fundamentally, substantive equality embodies a vision of meaningful socio economic equality.

A substantive interpretation of our Interim Constitution's equality clause, with respect to gender equality specifically, was recently endorsed by the Constitutional Court in the case of *President of the Republic of South Africa v Hugo.*[16] Goldstone J, speaking for the majority of the court, held as follows:

> "We need . . . to develop a concept of unfair discrimination which recognises that although a society which affords equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the goal of constitutional equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context."[17]

The reforms argued for in this paper in the name of gender equality involve differential rather than identical treatment of women and men. This is so because they are premised not on a shallow formal equality but on a substantive conception of the term which mandates preferential measures in order to combat entrenched disadvantage.

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16 1997 (6) BCLR 708 (CC).

17 At 729 G-H.

CHAPTER 1

THE CAUSE AND NATURE OF VIOLENCE AGAINST WOMEN IN RELATIONSHIPS

1.1 The Cause of Violence Against Women in Relationships

A multiplicity of theories seek to explain the phenomenon of domestic violence. Generally speaking they can be sorted into two camps: individualistic and sociological.

Under the individualistic umbrella are the theories that seek personal explanations for domestic violence.[18] Factors such as drug and alcohol abuse, stress, frustration, underdevelopment, mental illness, violent families of origin and the victim's actions are cited, either singly or in combination, as the causes of the problem.

Theories in the second camp emphasise broader social influences.[19] They point out that violence is as inevitable in the family as it is in any other dynamic social institution. Dynamic social institutions are stressful and society teaches that violence is an acceptable means of dealing with stress. The existence of violence in the culture at large, for example in war, and the advertising of it as permissible, for example in films, affirms the validity of using violence on a personal level.

A fundamental problem with both these types of theory is their obliviousness to gender.

The individualistic perspective cites factors such as alcohol and drug abuse, stress, frustration and underdevelopment as the causes of domestic violence. These ills may indeed precipitate

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18 See the multiplicity of references cited in United Nations *Strategies for Confronting Domestic Violence: A Resource Manual* infra n 47 at 10, footnotes 20-21.

19 See for example Goode "Force and Violence in the Family" 33 *Journal of Marriage and the Family* (1971) 624 and Strauss "Wife beating: How Common and Why?" 3 *Victimology* (1978) 443.

violence in men. They do not however, tend to do so in women. What is being described here is not an individual but a male reaction. The same is true of the sociological theories. Individuals do not learn from society that violence is an acceptable means of dealing with stress, men do. Most women do not respond to stressful situations in a violent manner.

As Angless says in her critique of these models:

> "They claim to be speaking about individuals but they are in fact speaking about what men do."[20]

These theories thus obscure the fact that men, overwhelmingly, are the perpetrators of domestic violence and women its victims. The sexual identity of abuser and abused, at the heart of domestic violence, remains unexamined by these theories.

The assumption that violence occurs in stressful dynamic social institutions also glosses over gender. Violence is endemic in the family rather than the workplace for instance. This is a defining feature of the problem. Why "the family" renders women particularly vulnerable to abuse is not explained by these theories.

In the result these theories refer to a number of perils which may indeed precipitate or exacerbate abuse by men of women in the family. They fail however, to answer the core questions: why women? why the family? The answers lie buried in the oppression of women in the patriarchal social order generally and the institution of marriage in particular.

Women's subordination is complex, embedded as it is in a web of social and economic institutions and deeply ingrained in ideology. As stated in the introduction this topic merits a thesis in its own right. This section attempts to do no more than disturb the veil of normality which cloaks the patriarchy, pointing to women's subordination in society, emphasising that marriage has, historically, been a site of particular severity in this regard and concluding that this renders women "legitimate victims" for domestic violence.

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20 Angless *An Exploration into the Counselling Needs of Battered Women: A Feminist Perspective for Clinical Social Work Practice* Masters Dissertation, University of Cape Town (1990) at 20.

Women and men relate to each other in terms of the hierarchical gender relationship institutionalised in society. In sexual relationships for example, male domination and female subordination are imprinted in society's sexual scripts so that man is cast as the seducer and woman, the seduced. Lacking agency as the seduced, woman's sexual autonomy is denied and her satisfaction is assumed to be dependant on male activity. It is supposed that women need some degree of persuasion before they will engage in sexual activity.

> "Thus the popular belief in male culture that what matters in success with women is not attractiveness per se, but the ability to apply techniques of seduction, cleverness in countering women's objections and persistence in overcoming her resistance."[21]

The passivity of female sexuality has been internalised by women themselves, with women tending to be obsessed with their desirability, rather than their desire.

Society's sexual scripts do not merely dictate agency and passivity, they are also inscribed with value, unequally. Thus the double standards of sexual morality that contaminate our society. Male sexual power is respected as natural while women who lead healthy sex lives are susceptible to vilification as whores and sluts. The English language has no name for healthy female sexuality while derogatory terms for "promiscuous men" do not exist. Indeed while promiscuity is condemned as shameful for women it tends to be synonymous with virility for men.

These oppressive sexual scripts are reinforced through a number of social institutions. The media thrives on gender stereotypes like the irresistible Don Juan and the dirty whore. The booming pornography[22] and prostitution industries are further examples. Pornography is something men are entitled to, require, for the healthy management of their enormous libido.

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21 Jackson "The Social Context of Rape: Sexual Scripts and Motivations" in Searles and Berger (eds) *Rape and Society* (1995) at 17.

22 In the US the pornography industry grosses around $8 billion a year, more than the music and movie industries combined. In the UK the major pornographic firms sell approximately 2 million pornographic magazines a month, raking in profits of 20 million pounds a year. Itzin "Entertainment for Men" in Itzin (ed) *Pornography: Women, Violence and Civil Liberties* (1992) at 25.

In addition to portraying women as sex objects for male pleasure, an alarming percentage of pornography depicts women becoming aroused by forced sex and physical pain.[23] Prostitution, another service industry for the immense male sex drive, says that it is a man's monetary, if not divine, right to gain access to the female body. It says that sex is a female service that should not be denied the civilised male. As Vogelman asks

> "When young men learn that females can be bought for a price, then how should they not conclude that what may be bought may also be taken without the civility of monetary exchange."[24]

Without belying the complexity of all these issues, they tend to conspire together to set a socio sexual stage which makes possible the enormous incidence of rape[25] and the morass of pernicious myths which trivialise and condone it.[26] It was on this socio sexual stage that Helen's husband vilified her as a prostitute and raped her with impunity.

Another facet of women's subordination is our economic impoverishment in relation to men. Internationally women do 2/3 of the world's work, yet earn no more than 1/10 of the world's income and own less than one per cent of the world's property.[27] In South Africa female poverty is especially severe. In rural areas, four out of every five South African women have no income at all.[28] Where women are employed they tend to be clustered in the professions with the lowest status and poorest remuneration:

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23 See Russell "Pornography and Rape: A Causal Model" in Itzin (ed) *Pornography: Women, Violence and Civil Liberties* (1992) 328 in which she discusses research which reveals this to be the content of the majority of pornography and how this contributes to rape.

24 Vogelman *The Sexual Face of Violence: Rapists on Rape* (1990) at 25.

25 South Africa has one of the highest rape rates in the world. It is estimated that a South African women is raped every 34 seconds, totalling approximately 950 000 women raped each year Rape Crisis, Cape Town (1996). For statistics on rape in other countries see *Women's Human Rights* supra, n 7.

26 For more on rape as arising out of and reinforcing the patriarchy see Searles and Berger, *Rape and Society* supra, n 21 and, in South Africa, Vogelman, *The Sexual Face of Violence* supra, n 24.

27 United Nations Document 39\1988 para 59.

28 Budlender (ed) *The Women's Budget* (1996) at 37.

> "In South Africa 20% of all employed women are employed in domestic service and another 15% in clerical jobs. Despite the fact that women constitute just over a third of all employees, more than half of the employees in the lowest two income brackets (under R1000 and between R1000 and R2000 a year) are women, while women constitute less than one tenth of the top three income brackets (above R70 00)."[29]

Again women's economic oppression is complex, certainly it is not as simple as gender discrimination in employment practice. A fundamental problem is the masculinity of the workplace, in the sense that it is structured around the typical male worker free of domestic and child raising burdens. This renders it difficult for many women to participate meaningfully in this world and sees them either confined to the home or subjected to a gruelling double shift.[30]

The law, by reflecting and reinforcing the patriarchal status quo constitutes another site of women's oppression. Rape law, for example, is grounded in the notion that women fabricate these charges and so subjects survivors to a special cautionary rule placing them in the same category as accomplices and children whose testimony is required to be treated with scepticism.[31] Pornography is protected as freedom of expression. Prostitutes are arrested and charged with the crime of procuring sex for money. Not their clients however, who are merely exercising their right of access to the female body. In the workplace context, the law, by adhering to a formal conception of equality, has tended to reject women's demands for maternity pay and child care facilities as "special treatment" and "discrimination."[32]

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29 O'Regan "Equality at Work and the Limits of the Law: Symmetry and Individualism in Anti Discrimination Legislation" in Murray (ed) *Gender and the New South African Legal Order* (1994) at 65.

30 On the patriarchal structure of the workplace see for example Finley "Transcending Equality Theory: A Way out of the Maternity and Workplace Debate" 86 *Columbia Law Review* (1986) 1118 and Littleton "Reconstructing Sexual Equality" 75 *California Law Review* (1987) 1279.

31 On the problems with South African rape law see Hall "Rape and the Politics of Definition" 105 S A Law Journal (1988) 67, as well as, Reddi "A Feminist Perspective of the Substantive Law of Rape" and Schwikkard "A Critical Overview of Rules of Evidence Relevant to Rape Trials in South African Law", both in Jagwanth et al (eds) *Women and the Law* (1994).

32 See supra n 30, as well as O'Regan "Equality at Work and the Limits of the Law" supra, n 29.

Historically, marriage has been a particularly severe site of women's subordination.[33] As Dobash and Dobash put it:

> "To be a wife meant becoming the property of a husband, taking a secondary position in the marital hierarchy of power and work, being legally and morally bound to obey the will of one's husband and thus quite logically subject to his control, even to the point of physical chastisement and murder."[34]

Marital power placed women under the perpetual guardianship of their husbands. In the same category as children and the mentally ill, they were defined as incapable of performing any legal activity without their husband's authority and supervision. Moderate chastisement of wives by their husbands was permissible. Western countries subscribed to the "rule of thumb" which entitled husbands to beat their wives with sticks no thicker than their thumbs. Husbands had an absolute right to demand sex of their wives whenever they pleased. Marital rape was a contradiction in terms.

While the rule of thumb was abolished a long time ago, only in 1993 did South Africa repeal the marital power and criminalise marital rape.[35] This is too recent for the patriarchal family to have yet become a legacy in our country. It remains brutally real. "Head of the family" credo continues to be blatantly espoused by men as does entitlement to wifely sex. Many women continue to feel morally bound to obey their husbands.

Nor could the repeal of these discriminatory laws create equality in marriage. This action, while necessary, was merely a chink in the edifice of the patriarchy. This section has attempted to reveal the patriarchy as a complex, ubiquitous web, extraordinarily durable by

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33 See for example, Smart, *The Ties that Bind: Law, Marriage and the Reproduction of Patriarchal Relations* (1984) and Dobash and Dobash *Violence Against Wives: A Case Against the Patriarchy* (1980).

34 Dobash and Dobash ibid at 33.

35 Marital power was abolished by the General Law Fourth Amendment Act 132 of 1993 and marital rape was criminalised by s 5 of the Prevention of Family Violence Act 133 of 1993. The incidence of reported marital rape appears to be negligible. In answer to a question in Parliament in 1995, the Minister of Justice stated that there had been 19 prosecutions nationally for marital rape since the inception of the Act. Of these only 5 resulted in convictions for rape. Hansard, 15 March 1995 at 91.

virtue of the depth of its implantation in history and the fibre of acceptance, normality that weaves through it. This means that the "head of the family" credo and its brutal extremes will not easily become obsolete. There are patriarchal re-enforcements everywhere with which they may be revitalised. There are the double standards of sexual morality. There is the vilification of women as whores. There is rape. There is female poverty.

In society, women's entrapment in patriarchy's web, has rendered us "legitimate victims" for a plethora of discrimination and violence. The phrase "legitimate victim" has been used by a number of feminists. "Legitimate" is defined as logical or reasonable. A synonym for "victim" is prey. The phrase is thus intended to capture the fact that society's structural and belief system makes women logical or reasonable prey for certain forms of abuse. In marriage, the specific institutionalisation of male domination, including violence, and female subordination has rendered women "legitimate victims" for domestic violence. This continues to be so.

The fact that women's subordination renders us "legitimate victims" for domestic violence is in flagrant violation of the equality guarantee, foundational to our Constitution. This places the state under an acute obligation to take effective legal action against domestic violence. In order to be effective such legal action must respond substantively to the inequality that generates domestic violence. This necessitates preferential measures in women's favour in order to diffuse the power imbalance between the sexes.

1.2 The Nature of Violence Against Women in Relationships

Women do stay in abusive relationships, if they did not violence against women in relationships, as a phenomenon, would not exist. Working in the field of domestic violence, one is routinely bombarded with the baffled "But why?" The reasons are complex involving a range of psychological, social and economic inhibitors. This section attempts to do no more than shine a thin light into each of these types of inhibitor with a view to improving understanding. An effective legal response to domestic violence needs to accept that women

do remain in abusive relationships and imbue itself with some understanding of the reasons for this.

1.2.1 Psychological Inhibitors

One of the first psychological descriptions of domestic violence was that put forward by Lenore Walker. Based on her interviews and research with abused women, she came to the conclusion that violent relationships are cyclical in nature.[36] Broadly speaking there are three stages to this cycle:

1. The tension building phase

The first is the tension building phase during which the relationship between the partners becomes increasingly tense. Women who have been through this cycle a number of times come to realise that violence is looming though they cannot predict precisely when it will occur. They may try to prevent its onset by striving to gratify their partners every whim. They may find the tension unbearable and provoke the violent incident in order to get it over with. These are two strategies frequently employed by abused women in an attempt to control *when* the violence occurs. That the violence will occur is certain.

2. The Violent Incident

This may last from several minutes to a few days. It may consist of verbal abuse only but frequently includes physical assault also.

3. The Honeymoon Phase

Following the violent incident, the abuser becomes repentant and apologetic, promising never to repeat his behaviour and frequently showering his partner with gifts and affection in order

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36 Walker *The Battered Woman* (1979) at 55-70. See also Walker "Victimology and the Psychological Perspectives of Battered Women" 8 *Victimology* (1983) 82.

to demonstrate his contrition. This may be sincere or manipulative. Very often the honeymoon phase persuades women not to leave or take action against their abusers.

Walker noted that over time these cycles gradually occur closer and closer together. Thus in a typical case a violent incident might occur once yearly for the first few years of the marriage, increase to twice yearly for several years, ten years into the marriage, it is occurring weekly.

She also noted that within the cycle the abuse increases in severity over time so that the violent incident becomes longer and the honeymoon phase shorter.

In many countries research and counselling abused women have demonstrated support for Walker's model. Helen's case, for example, clearly reveals the honeymoon stage:

> "After the beatings he always used to apologise and cry, he's so sorry for what he did."
>
> "He came crying and begging for forgiveness."

True to Walker's hypothesis this phase did wane over time. Towards the end of their marriage, Helen's husband barely apologised for his brutality.

It should be noted however, that not all abusive relationships fit this pattern. Some abusers never apologise not believing their behaviour to be wrong. Violent incidents may occur suddenly without a tension building phase.

At this stage two factors which lend insight into the battered woman's psychology should be pointed to. Firstly, her partner's contrite and loving behaviour during the honeymoon phase may persuade her not to leave or take action against him. Her susceptibility to persuasion is intensified by factors arising out of the nature of an intimate relationship: her emotional attachment to him; her belief or hope in his reform; her commitment to the relationship.

Secondly, the fact that the abuse escalates in frequency and severity gradually over time lengthens the period of emotional attachment and investment in the relationship, making it more difficult to leave.

In addition to her psychological description of battery, Walker developed the theory of "learned helplessness" to explain women's entrapment in abusive relationships. An adaptation of Seligman's theory of learned helplessness, it postulates that repeated exposure to aversive situations which cannot be controlled, impairs motivation to respond. Eventually even if appropriate responses are made which do control events, victims have difficulty believing that the responses are under their control and that they are effective. The result is anxiety, depression and ultimately, helplessness. Thus Walker says:

> "Once the woman is operating from a belief of helplessness, the perception becomes reality and she becomes passive, submissive, helpless."[37]

An interesting theory of the abused woman's entrapment in her relationship is the Stockholm Syndrome. The syndrome derives its name from a bank robbery in Stockholm in 1973 in which four people were taken hostage. During their six days in captivity the hostages came to bond with their captors - to the extent that they saw their captors as protecting them from the police. Since this incident it has been recognised that bonding between captive and captor (occurring on both sides) is not unusual and happens in a number of hostage situations such as concentration camp prisoners, cult members, prisoners of war, abused children and battered women.[38]

Psychologists have identified four conditions necessary for the syndrome to take hold:

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37 Walker *The Battered Woman* ibid at 47.

38 This information is drawn from the POWA Training Manual (1996) at 36. See also the work of Russell and Copelon which argues that domestic violence should be recognised as torture by virtue of the fact that it accords with Biderman's Torture Model. Russell "Wife Rape and Battery as Torture" in Jagwanth et al (eds) *Women and the Law* (1994) 102 and Copelon "Intimate Terror: Understanding Domestic Violence as Torture" in Cook (ed) *Human Rights of Women* (1994) 116.

1. The captor threatens to kill the captive and the captive believes him\her to be capable of the act.

2. The victim cannot escape and his\her life depends on the captor.

3. The victim is isolated from support.

4. The captor is both kind and violent to the victim which creates in the victim a sense of total dependence on the captor.

Once these four conditions are present, they may result in the two stages of victimisation. The first is disbelief and denial where the victim refuses or is unable to believe what is happening to her. The second involves accepting the reality of the situation which causes in psychological jargon: traumatic psychological infantilism and pathological transference. This means that the victim feels both totally dependent on her captor and reads positive feelings and intentions into his behaviour.

> "In this syndrome the victim's whole attention is focussed on survival and she clings to her captor because he has complete power and control over her. Should the captor not use this power the victim may feel tremendous gratitude and so believe that he is actually a good person. But the victim also realises that any expression of anger, resentment or challenge to the captor's power is likely to result in violence. Under these circumstances she becomes highly sensitive to the captor's moods and whims as well as sensitive to his demands and desires. This theory explains the psychological impact of being at the mercy of someone else's whims and can help others understand why battered women feel such a bond with their abusers - to the extent that they may try to protect the men that beat them."[39]

A jarring difference between battered women and hostages is the assistance and support they receive from society. Men at risk of being kidnapped, certain wealthy businessmen and political leaders, are actually provided with manuals outlining survival strategies. These include being a good listener, being sensitive to the desires and feelings of the captor, being as non aggressive as possible, in short, practising stereo typically female traits. Battered

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[39] POWA Training Manual ibid at 37.

women however, are not congratulated for using these survival skills. They are criticised for not standing up to their abusers and accused of inviting the abuse. Moreover, society tends to be outraged at the crime of kidnapping. Perpetrators are hunted down and punished severely. Society tends to excuse the similar conduct in batterers by pointing to stress or alcohol. Batterers are rarely charged and less frequently punished.

1.2.2 Social Inhibitors

The social inhibitors which keep women from leaving abusive relationships are complex.

As noted above patriarchal family ideology has been widely internalised. This may enable men to rationalise their abuse on the basis of their authority as head of the family. Consider this batterer's reasons for abusing his wife:

> "She's constantly checking on my whereabouts. That kind of behaviour annoys me and I refuse to put up with it. Its ridiculous for her to expect me to tolerate being told by her what I can and can't do. I'm the man of the house."[40]

Women, tending to assume responsibility for order and happiness in the home, often blame domestic abuse on their own inadequacies, believing that it will stop if they are just more efficient, more loving. They vow to improve their wifely diligence. Thus a South African survivor said:

> "I just thought perhaps if I am soft on him because I've heard a lot about his past, he's had such a traumatic past, and I haven't had such a bad past, maybe I should just show him all this love and give in to him. I got to waiting on him hand and foot."[41]

The wife as supportive, servile is so deeply and powerfully entrenched that women persist in this manner for years. Many abused women leave only when they reach a point at which they

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40 Quoted in Russel "Wife Rape and Battery as Torture" in *Women and the Law* supra n 38 at 116.

41 Quoted in Davey *The Final Conflict: A Phenomenological Examination of the Decision to Leave an Abusive Relationship* Masters Thesis, University of South Africa (1994) at 129.

realise that no matter how close they come to wifely perfection, he will continue to find excuses to abuse them.

The sanctity of marriage, integral to patriarchal family ideology, is a potent inhibitor. This was an important reason for Helen remaining in her marriage:

> "The thing I think that kept me in my marriage was the children. I come from a family where we didn't have any divorce. I was the only one out of my family that ever got divorced and I always thought its the right thing to stay in the marriage for the sake of the children, the family."

Being widely held in society, such views are reinforced by outsiders. Thus Helen said:

> "My mother always tried to patch things up, whatever happened. I, at one stage, felt that my mother cared more for him than what she did for me, but it was basically just to keep the marriage together."

On one occasion, while the couple was divorced, Helen's husband followed her into a shop and attempted to lure her into his car. Helen feared abuse but was persuaded by the shopkeeper to go with him:

> "The shopkeeper said he's my husband and I should go with him and sort things out."

Even when seeking escape, the sanctity of marriage is impressed upon abused women. A South African study entitled "Battered Women's Experiences and Perceptions of Helping Agencies"[42] revealed that the predominant social work response to an abused woman's cry for help was to arrange a family counselling session:

> "The social worker got us together to try to get us to make it up again. It was okay for a while, then he'd beat me again and she would get us together again."[43]

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42 Hill *Battered Women's Experiences and Perceptions of Helping Agencies* Honours Dissertation, University of Cape Town (1988).

43 Ibid at 87.

> "The social worker used to ask him: "What is it about your wife's behaviour that you don't like? What is it that she does wrong?"[44]

The family therapy approach seeks the cause of domestic violence in the dynamics between two equal people. It assumes that the woman is also guilty and must be involved in the solution. Its obliviousness to the essential inequality of the marriage relationship abandons the victim to her powerlessness and shame.

Police policy to domestic violence was traditionally a strict one of non interference. Thus a South African survivor reported:

> "I've been there many times full of blood and every time they just say: 'We don't deal with domestic affairs.'"[45]

While we may have seen the formal amendment of police policy, the trivialisation of domestic violence persists. This is evident in the police's failure to make a serious effort to arrest Helen's husband when she reported violation of her interdict recently.

Thus it is that abused women experience a profound sense of isolation. Their lot as wife and mother isolates them at the outset by confining them to the home which privatises and individualises their experience. Batterers may intensify this social isolation by forbidding contact with family and friends or locking them up. If abused women do seek escape, helping agencies are singularly unsupportive, haranguing them with the sanctity of the family, blaming or scorning them. The result is a devastating isolation. Despised, invisible, they crawl back into their homes, the only place they have. Their shame is intensified and their male partner's power is potently intact. Helen's shame was such that she attempted on two occasions to commit suicide. She did this because she was "totally humiliated." It is indeed an indictment of our society that the *victim's* of violence at the hands of their intimate partners are left feeling "totally humiliated."

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44 Ibid.

45 Ibid at 84.

1.2.3 Economic Inhibitors

The economic oppression of women, especially severe in our country, has already been detailed.[46] This renders many South African women financially dependent on their male partners. Some batterers confiscate their partner's earnings or forbid them from working altogether. Abused women frequently do not leave because they fear being unable to support themselves and their children. Helen's case is an example. Early in her marriage she decided against seeking a divorce and determined to persevere with her husband because she felt unable to support her two young children alone.

Very often abused women simply have nowhere to go. Long term, alternative accommodation is unavailable or in affordable. Short term, friends and relatives refuse or are unable to have them. In South Africa there is a desperate shortage of shelters for battered women.

These psychological, social and economic inhibitors tend to interlock, forming a cruel and tangled web which traps women in abusive relationships. The combination of the trauma of abuse at the hands of an intimate, social pressure to preserve the family and financial difficulty is indeed ghastly to contemplate and makes the abused woman's continuation in her relationship more understandable.

In order to respond to the nature of domestic violence, the law needs to do two things. First it needs to accept the current reality of women's continuation in abusive relationships. This means that it is faced not simply with abuse, but abuse in a context in which two people are emotionally and financially involved with one another. A recognition of the intimacy of the parties must underpin legal action against domestic violence. The tragic reality of women's persistence in violent relationships will not be changed by denying that this is the case or blaming them for not leaving, but by attacking the inhibitors that keep them from doing so. This is the second thing that the law needs to do. Where possible legal action against

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[46] See supra n 27-29.

domestic violence needs to be targeted at freeing survivors from these inhibitors. Examples of the way in which this may be done are as follows: In criminal prosecution proceedings against their batterers, abused women are in a singularly vulnerable position. The criminal justice system is already notorious for the secondary victimisation it inflicts upon women in many contexts. This is compounded for battered women by factors arising out of the nature of domestic violence: the trauma of testifying against an intimate partner and the deleterious psychological effects of domestic abuse. To alleviate their vulnerability and to ease rather than reinforce their trauma, the law needs to provide abused women with extra support in this context. A further example is sentence. The intimacy of the parties in domestic violence cases means that sentencing the abuser will frequently cause economic hardship for the survivor. In view of the female poverty set out above and the fact that many women are financially dependant on their abusers, this can have the effect of locking survivors in their violent relationships. To facilitate their emancipation the law needs to develop strategies which reduce the detrimental impact of sentence upon survivors.

This Chapter may be concluded by essentialising my arguments thus far. In order to be effective, legal action against domestic violence must first, respond to the inequality which generates the problem. This requires preferential measures in women's favour in order to diffuse the power imbalance between the parties. Second, it must respond to the nature of domestic violence. This requires innovative measures, underpinned by recognition of the intimacy of the parties and targeted at the inhibitors which keep women from leaving abusive relationships.

It is to an examination of how the law has fared in this regard that Chapter 2 now turns. 2.1 begins by considering some of the innovative legal strategies developed abroad in an effort to respond to the cause and nature of domestic violence.

CHAPTER 2

THE LAW'S RESPONSE TO VIOLENCE AGAINST WOMEN IN RELATIONSHIPS

2.1 Legal Remedies Abroad[47]

The traditional legal response to domestic violence has been a criminal one. Since the abolition of the rule of thumb, abused women, in most countries, have been able to lay assault charges against their batterers. The nature of domestic violence, however, has rendered the criminal approach drastically inadequate. Innovations introduced in some countries in an effort to improve its effectiveness have been insufficient. This has caused many countries to create a further civil remedy specifically tailored to domestic violence. This section will begin by pointing to the criminal law's restricted capacity to respond to domestic violence and some of the salutary, though insufficient, improvements effected in this regard. It will then move on to consider the civil approach and the extent to which it responds to the criminal law's limitations.

The criminal law is substantively deficient in its application to domestic violence. The physical abuse that founds an assault charge is merely one facet of domestic violence. Its other aspects include sexual, psychological and economic abuse, and threats of all of these. It is precisely the ongoing combination of all of these forms of brutality that renders domestic violence so egregious. A handful of countries have attempted to deal with this by creating a crime of "domestic violence" which extends wider than just physical assault and encapsulates some of these other cruelties.[48] Some countries have criminalised particular aspects of domestic violence, common examples are intimidation and harassment. Bangladesh and India

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47 Much of this information is drawn from United Nations, Centre for Social Development and Humanitarian Affairs *Strategies for Confronting Domestic Violence: A Resource Manual* (1993)

48 In Poland, for example, domestic violence is a crime under article 184 of the Penal Code of 1969. UN Resource Manual supra n 47 at 13.

have criminalised two forms of domestic violence peculiar to their counties: demanding dowry and inflicting violence to collect dowry.[49] Few jurisdictions however, recognise the criminality of psychological and economic abuse in the context of violence against women in relationships.

Perhaps the more serious difficulty with the criminal law is the plethora of process problems which plague its application to domestic violence cases. Its exacting standard of proof makes obtaining a conviction difficult. This is particularly so in the light of the evidentiary difficulties which blight crimes within the family. The survivor is often the only witness making her evidence crucial to prove the guilt of the accused. A serious problem is that survivors often continue to live with, or at least have contact with, their batterers during the awaiting trial period. This renders them susceptible to pressure to withdraw the charge or refuse to testify, not to mention further assault.

Some countries, in recognition of the danger that survivors face during the awaiting trial period, have mandated more stringent bail policies in respect of domestic violence cases:

> "In Israel for example the police have to consider whether the court should be asked to include a protection order as a condition of bail. Non compliance with such a protection order is grounds for arrest pending trial.
>
> In New South Wales, a special bail form, providing conditions that may be imposed on the person to be released, is used by the police in cases of domestic violence. The accused can for example be released on condition that he does not drink alcohol or approach the survivor. If the offender has previously broken bail conditions, bail may be refused unless the person granting bail is satisfied that the person will comply with the conditions this time."[50]

In an attempt to increase prosecution and conviction rates some countries have adopted "no drop" prosecution policies in respect of domestic violence cases. These policies have

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49 United Nations Resource Manual supra n 47 at 13.

50 Ibid at 30.

however, been applied with offensive severity in some areas. In England and Canada, for example, abused women have been subpoenaed to testify at their husband's criminal trial and imprisoned for contempt of court when they have refused.[51]

Such ruthless pursuit of conviction highlights the fact that structurally, the criminal justice system is insensitive to the needs of the domestic violence survivor. The focus of the criminal justice system is solely on the state interest in securing a conviction. The survivor is merely a state witness. She is intimidated without legal representation and traumatised by cross examination. The criminal justice system has acquired notoriety for its secondary victimisation of women in many contexts, rape being a compelling example. This tends to be compounded for abused women by factors arising out of the nature of domestic violence: the trauma of testifying against their intimate partners and the debilitating psychological effects of their sustained abuse.

A salutary innovation to ameliorate the vulnerability of battered women in this context has been the establishment of victim advocacy groups. These groups function to provide support and specialised services to survivors during criminal proceedings against their abusers. For example:

> "In Ontario, Canada a special Victim/Witness Assistance Program aids victims of domestic violence (as well as other victims of personal crimes). Since 1990, agencies in France whose statutory purpose is to combat domestic violence may become a civil party in the trial of a perpetrator. In Canberra, Australia, crisis workers at the Domestic Violence Counselling Service attend court proceedings with the victim and provide her with other forms of assistance."[52]

While such improvements are valuable, it is evident that the criminal law is substantively, procedurally and structurally severely limited in its ability to deal with domestic violence. In an effort to respond to some of these limitations, many countries have, without abandoning

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51 Ibid at 18.

52 Ibid at 41.

the criminal option, created a further civil remedy specifically tailored to domestic violence.[53] This remedy is variously termed an interdict, injunction or protection order and its details differ from one jurisdiction to another, essentially however, it operates as follows:[54] Abused women can apply for the order in the absence of the perpetrator and in an expeditious fashion. The order is granted if it is shown that it is more probable than not that he has caused or is about to cause harm. Orders which can be made include forbidding the perpetrator from assaulting, harassing or approaching the survivor and excluding him from all or part of the family home or the area in which the home is situated. Such orders may be made even if the abuser legally owns the property.

Violation of the order generally results in the immediate arrest of the perpetrator. Under many statutes the arrest power is automatically attached to the order. In others the arrest power is attached only if the victim requests it. In some jurisdictions the police are empowered to arrest the perpetrator without a warrant if he breaches the order. All that is required is knowledge of the existence of the order, and knowledge or suspicion of breach.

Penalties for violating the order vary but the ultimate punishment is imprisonment.

Generally these orders are binding only once served on the abuser. They are generally temporary in nature.[55] Either they expire after a fixed period or summon the defendant to appear in court on a return day to show cause why the order should not be made final. Where they operate with a return day, the applicant bears the onus of persuading the court that the order should be made final.

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53 Countries which have done so include: Australia, New Zealand, Austria, some North American states, and most of the provincial jurisdictions of Canada, England, Scotland and Wales. Ibid at 21.

54 See generally ibid at 18-22.

55 This is the position in all the Australian jurisdictions, see Riordan (ed) *The Laws of Australia (Title 17 Family Law)* (1995), and many US states, see for example the Kentucky Revised Statutes, section 403.740 and the Minnesota Domestic Violence Act, section 7.

This civil remedy appears to cure many of the problems with the criminal approach to domestic violence. Substantively it boasts the tremendous advantage that its terms are not limited to criminal, or even delictual, conduct but can be tailored to deal with particular situations.

Procedurally its standard of proof is the considerably less exacting "balance of probabilities." It offers survivors immediately enforceable legal protection, eliminating the hazardous waiting period during which they are vulnerable to further abuse and pressure to desist from their action. Indeed, perhaps this remedy's most salutary feature is the fact that it is quickly and cheaply obtainable.

Structurally too, the civil remedy would seem to have an advantage over the criminal approach. While the details of the court enquiry for violation of the interdict differ across jurisdictions, the procedure is generally civil with criminal consequences. Thus survivors are intrinsically involved in the process which is preferable to their auxiliary role as state witness in the criminal law.

While it boasts many salutary features, the civil remedy is not without its problems. Many jurisdictions have noted that a severe limitation is the fact that its effectiveness is almost entirely dependant on the co operation of the relevant officials.[56] Where judicial officers are reluctant to grant orders or the police fail to arrest for breach, the remedy is rendered impotent.

A civil response to domestic violence is problematic in itself.[57] It charges and punishes batterers for the offence of contempt of court. Their crime is violation of the court order and thus the dignity of the court rather than the abuse they have inflicted on their partners. This

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56 This has been noted in Australia and England. See UN Resource Manual supra, n 47 at 20 and 22.

57 See for example Goolkasian "Judging Domestic Violence" 10 *Harvard Women's Law Journal* (1987) 275 and, in South Africa, Murray and Kaganas "Law and Women's Rights in South Africa: An Overview" in Murray (ed) *Gender and the New South African Legal Order* (1994) at 125.

allows them to escape the full consequences of their actions and leaves survivors with a sense of justice not done. These sorts of effects and indeed, the civil law by its very nature, perpetuates the view that domestic violence is less serious than violence in other contexts, compounding the trivialisation of the problem.

A problem which plagues both the criminal and the civil response to domestic violence is sentence. The courts, complicit in the trivialisation of the problem, hand down significantly less severe sentences in cases of domestic violence than for other violent crimes.[58] Community service, fines and suspended sentences are common. Incarceration tends to be ordered only in the most heinous of cases. There is however, a deeper problem. The involvement of the parties in domestic violence cases means that sentencing the abuser will frequently cause economic hardship for the survivor. In an effort to deal with this some countries have developed sentencing strategies which aim to reduce the sentence's deleterious impact on the survivor. One example is the custodial sentence. This is served over weekends and in the evenings, allowing the offender to continue working and providing financial support to the family. Some jurisdictions have ensured the success of this option by combining it with a restraining order and garnishment of wages to support the family.[59] A further example is ordering the abuser to pay restitution to the survivor rather than fining him.[60]

Thus many jurisdictions have risen to the unique challenges posed by domestic violence and fashioned some impressive legal strategies. They offer us wealth of ideas from which to draw. Notably, the tendency has not been to seek a single legal panacea for the problem, but rather to develop a range of complementary and mutually re-enforcing legal strategies. Many countries have bolstered the criminal approach to domestic violence with stringent bail laws, mandatory arrest and prosecution policies, victim advocacy groups and, in addition, created a valuable civil remedy. When all of these mechanisms are combined with sentencing

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58 United Nations Resource Manual supra n 47 at 44.

59 Ibid.

60 Ibid.

strategies focused on the needs of the survivor, the law offers significant resistance to domestic violence. However, as stated at the beginning of the paper the law is not the cure all for the problem. Being deeply woven into the social fabric, domestic violence demands combative action across numerous disciplines. Many countries have thus developed co-operative multi-agency strategies to deal with it.[61] Such models combine facets such as the law; counselling services and emergency shelters for survivors; rehabilitative programs for batterers and police and judicial training, as prongs in a co-ordinated attack on domestic violence. A facet of this type of network which has emerged recently in many areas, and epitomises the salutary co-operation taking place, is crisis intervention. In Canberra, Australia crisis intervention functions as follows:

> " . . . after receiving a call about an incident of domestic violence, the Canberra police telephone crisis workers from the Domestic Violence Crisis Service. The Service is a separate and autonomous 24 hour service. The crisis workers go with the police to answer the call. They try to ensure that the survivors immediate needs are met. They also provide extensive follow up, support and information services. They can help a woman to obtain a protection order or access to priority housing. This frees the police to deal with the crime without being distracted by other concerns."[62]

An example of one of these inter-agency models against domestic violence is the wife abuse management strategy in London, Ontario. The community has:

> "A police policy whereby perpetrators will be charged with the crime of assault.
>
> Intensive training for police on how to deal with wife battering.
>
> A family consultation service that provides 24 hour crisis intervention.
>
> An emergency shelter for women and children.
>
> A battered women's advisory clinic to provide legal and emotional counselling for women.

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61 See ibid at 5.

62 Ibid at 32.

A treatment group for men who assault their wives."[63]

In South Africa, we need to work towards such a co-ordinated inter-disciplinary strategy against domestic violence. At the same time we cannot ignore our country's present brutal reality, a reality which must inform an assessment of the effectiveness of the family violence interdict and the construction of appropriate reforms. In South Africa we have a desperate shortage of shelters for abused women. We do not have rehabilitative programs for batterers. We do not have crisis intervention groups. We do not even have a domestic violence hotline. We have the criminal law without any improvements tailored to domestic violence. Yet we are faced with rampant domestic violence. I will argue that the peculiar exigencies of our country preclude the simple importation of the foreign interdict procedure and justify our fashioning a version more suited to our needs.

2.2 Legal Remedies in South Africa

Prior to the enactment of the Prevention of Family Violence Act the following were the meagre legal options available to battered women in South Africa:

2.2.1 Assault

Abused women may lay criminal assault charges against their batterers. Without any of the ameliorations introduced abroad this option is enormously inadequate in our country. Helen's story is painful testimony to this fact.

As stated above, the awaiting trial period is hazardous for battered women. They generally remain in contact with their abusers and are thus vulnerable to pressure to withdraw their charges. Helen's husband was generally released on bail pending trial. He did more than pressurise her to withdraw charges, he punished her for her insubordination in taking legal

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63 Ibid at 16.

action against him. The rigorous bail policies adopted abroad would have assisted her greatly. That Helen never withdrew a charge is testament to her remarkable tenacity.

Over and over again Helen's assault charges came to nought. She says that the problem was generally "not enough evidence or witnesses." As stated above, the criminal law's onerous standard of proof, combined with the evidentiary difficulties which blight crimes within the family, make conviction difficult to secure in domestic violence cases. In Helen's case they made it impossible.

2.2.2 Interdicts in the Supreme Court

This remedy exists in theory rather than practice. It is cumbersome and expensive rendering it inaccessible to the majority of domestic violence survivors.[64] Legal representation is required. The application itself costs at least R2000, 00. Urgency has to be specifically proved. In November of 1991, the Cape Times reported that Supreme Court judges had refused several interdict applications by battered women because they had found that the interdicts were "not urgent" and that "the husbands were not timeously informed." One senior staff member seemed to reflect the sensitivity of the Court when he said that if a woman had been beaten for months, it was difficult to see the requisite urgency needed for an interdict application.[65]

Helen was not aware of this legal remedy and, even if she had been, it would have been in affordable.

2.2.3 Peace Orders

This remedy has the effect of reducing violence against women in relationships to the level of a petty disturbance, such as a dog barking. However, since it is available in the Magistrates

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64 See Novitz *Interdicts in the Magistrates Courts* supra n 11 at 31.

65 Quoted in Ross *Battered Women: An Invisible Issue* Unpublished Paper (1992) at 13.

Courts, it was sought more often than interdicts. While breach of these orders can theoretically result in arrest, they are routinely ignored by the police in practice. Helen obtained peace orders on several occasions and was always told by the police that "they cannot act on peace order."

It was against this backdrop of dire need for an effective legal response to domestic violence that the interdict procedure under the Prevention of Family Violence Act was created.

2.2.4 The Interdict under the Prevention of Family Violence Act

This section will begin by introducing and outlining the interdict procedure under the Prevention of Family Violence Act. Next, in order to contextualise my analysis of empirical data, it will discuss the major problems that have bedevilled the process thus far. These are first, a string of procedural difficulties, and second, the fact that the interdict has been held to constitute a violation of audi alteram partem.

The Prevention of Family Violence Act was promulgated by the National Party somewhat hastily in its last moments of power. In true National Party style it was drafted with barely a modicum of consultation. This is lamentable in view of the valuable input that could have been made by many women's organisations. These circumstances surrounding the Act's passing have caused cynics to remark that its motivation was no more than to appear to be doing something for women in order to attract the female vote.[66]

The Act's policy has also attracted deserved criticism. It is stated in the Explanatory Memorandum of the Draft Bill as follows:

> "to expedite the problem of battered women and to introduce a more effective system to deal with family violence outside the criminal courts in order to maintain family unity."[67]

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66 See Fedler and Malifani *The Prevention of Family Violence Act* Unpublished Paper (1994) at 2.

67 Quoted from the Explanatory Memorandum which accompanied the Draft Bill.

As Joanne Fedler points out, fighting family violence in order to maintain family unity is an anomaly in logic and practice. She notes that:

> "The peculiar reasoning in this context is reminiscent of the same judicial mind that not so long ago supported the marital rape exemption, on the grounds that it (the recognition of the rape, not the rape itself) would have the effect of destroying the marriage relationship."[68]

It has already been shown how the premium that society places on the sanctity of the family is fundamental in locking women into their abusive relationships. The law needs to abandon its legacy of complicity in this regard and commit itself unequivocally to the issue of paramount importance in domestic violence cases: the safety of the survivor.

Nevertheless, and perhaps unwittingly in the light of these motivational and policy problems, the National Party created a valuable procedure. It is useful to set out the procedure before discussing it. Briefly the process works as follows:

A party to a marriage, whether civil, customary or de facto, may apply for the interdict.[69] The application is heard by a Judge or Magistrate in chambers.[70]

The Judge or Magistrate may grant an interdict enjoining the respondent not to assault or threaten the applicant; not to enter the matrimonial home or the home of the applicant; not to prevent the applicant from entering the home; and\or not to commit any other act specified in the interdict.[71]

On granting the interdict a conditional warrant *must* be issued for the respondent's arrest.[72]

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68 Fedler "Lawyering Domestic Violence" supra n 3 at 238, footnote 32.

69 Section 1(2).

70 Section 2(1).

71 Section 2(1)(a)-(d).

72 Section 2(2)(a) and (b).

The interdict is of no effect until served on the respondent.[73] The respondent may, at any stage, on 24 hours notice to the applicant and the Court, apply for the interdict to be amended or set aside.[74]

On breach of the interdict the applicant is required to file an affidavit to this effect at her nearest police station.[75] On receiving this affidavit a peace officer *may* execute the warrant and arrest the respondent.[76] Notably the word "may" in the Act renders arrest discretionary rather than mandatory.

After arrest the respondent is required to be brought before a Judge or Magistrate within 24 hours.[77] A summary enquiry into the alleged breach of the interdict is then held.[78] On its conclusion the Judge or Magistrate may either order the release of the respondent or convict him of the offence of violation of the interdict (created by the Act).[79] Such conviction renders the respondent liable to a fine or imprisonment for a maximum period of one year.[80] The Act makes this enquiry mandatory.[81] The respondent may not be released unless this is ordered by a Judge or Magistrate.[82] The procedure to be followed in this enquiry is that set out in section 170 of the Criminal Procedure Act.[83] This section provides for a summary enquiry

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73 Section 2(3).

74 Section 2(2)(c).

75 Section 3(1).

76 Section 3(1).

77 Section 3(2)(b).

78 Section 3(4).

79 Section 3(4)(a) and (b).

80 Section 6.

81 Section 3(4).

82 Section 3(2)(a).

83 Section 3(5).

where an accused fails to appear in court after an adjournment or fails to remain in attendance during court proceedings.

Evidently the drafters looked to the domestic violence injunctions now common abroad since they crafted a similar specimen for South Africa. Thus many of the salutary features described above, which respond to limitations of the criminal law, have been imported into our country: The jurisdiction of the Magistrates Court renders the interdict cheaply and quickly obtainable. Survivors receive immediately enforceable legal protection. The terms of the interdict can be tailored to the circumstances of particular cases. Particularly laudable, is the fact that judicial officers are empowered to grant eviction orders against respondents.

The Act however, is far from comprehensive. It fails to cover non traditional family relationships. It contains no definition of domestic violence. It offers no guidance as to the degree of proof required of applicants or the grounds upon which judicial officers should grant interdicts. This has caused concern that in practice a high standard of proof may be demanded of applicants.[84]

Section 2(1), which deals with the terms of interdicts, is also superficial. Does it authorise the modification of existing access and custody orders? How does this impinge upon High Court jurisdiction? A more thorough approach would have been to authorise the grant of temporary custody, access and maintenance orders with interdicts as many foreign countries have done.[85] What may be prohibited under section 2(1)(d)'s "any other act"? psychological abuse? stalking? The absence of a definition of domestic violence fails to give judicial officers any guidance in this regard.

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84 See Novitz supra n 11 at 36.

85 This is the position in for example New Zealand, Domestic Violence Act 86 of 1995, section 27(2)(a) and many U S states. Indeed it is provided for in the American *Model Code on Domestic and Family Violence*, National Council of Juvenile and Family Court Judges (1994) at 305(3)(f); 306(3)(b) and 306(3)(d). In Canada temporary maintenance, custody and access orders as part of domestic violence protection orders, have recently been recommended by the Alberta Law Reform Institute *Domestic Abuse: Toward an Effective Legal Response* Report for Discussion No 15 (1995).

On the other hand, again perhaps unwittingly, our interdict is in important respects more powerful than its counterparts abroad. As noted above, family violence interdicts abroad are generally temporary in nature. They either expire after a fixed period or summon the respondent to appear in court on a return day to show cause why the interdict should not be made final. If they operate with a return day the applicant bears the onus of persuading the court that the interdict should be made final. Our Act is, characteristically, vague in this regard but it does not refer to either a temporary interdict or a return day. Moreover it makes provision for the respondent to apply for the amendment or setting aside of the interdict. This has caused it to be widely interpreted to provide for the grant of a *final* interdict ex parte and to burden the *respondent* with the onus of initiating and proving a challenge.[86] Clearly this interpretation results in a remedy infinitely more advantageous for survivors than the typical foreign version. I shall return to this contentious issue in due course.

The major problems that have bedevilled the interdict thus far are first, a string of procedural difficulties, and second, the fact that the interdict has been held to constitute a violation of audi alteram partem. I shall discuss each of these in turn.

2.2.4.1 Procedural Problems

As noted above, foreign countries have found a severe limitation of the family violence interdict to be the fact that its effectiveness is almost entirely dependant on the co-operation of the relevant officials. This has proved to be the case in South Africa also. It is precisely irresolute officials who have spawned the following string of process problems.

Concern has been expressed about the willingness of judicial officers to grant the interdict at all. The situation in this regard is unclear. There is however, a wealth of anecdotal evidence

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86 The Act has been interpreted in this fashion by most commentators writing on the subject, see supra n 11, the judges who have interpreted it, supra n 12 and the South African Law Commission, supra n 11.

which indicates that judicial officers are extremely reluctant to grant *eviction orders* against respondents.[87]

The sheriff's fee for service of the interdict is required to be borne by the applicant.[88] This fee varies from approximately R20 to R80 depending on the difficulty of service. This is in affordable for many applicants.[89] Where this is the case, Magistrates can order that the fee be paid by the state, but it seems that in practice they are simply not doing so.[90] Moreover in rare cases where state assistance is ordered, there is evidence that long delays are being experienced due to sheriffs refusing to act until they receive the fee from the Department of Justice.[91]

A severe problem appears to be police reluctance to arrest abusers for violation of the interdict.[92] As noted above the Act gives them a discretion in this regard. There is further evidence that in the event of arrest, abusers are being released on warning without being brought before court as mandated by the Act.[93] Finally, as noted above, sentence is a problem which blights domestic violence. There is anecdotal evidence that sentences on conviction for violation of the interdict are mild in the extreme.[94] The extent to which sentences are causing economic hardship for survivors is unclear.

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87 I have found this to be the case in my work in the field. It is also noted by Novitz supra n 11 at 37.

88 Novitz supra n 11 at 43.

89 See Fedler supra n 3 at 243.

90 See Novitz supra n 11 at 43 and Clark supra n 11 at 598.

91 S A Law Commission Discussion Paper 70 supra n 11 at 59.

92 Fedler supra n 3 at 246; Clark supra n 11 at 598 and S A Law Commission Discussion Paper 70 supra n 11 at 76ff.

93 S A Law Commission ibid.

94 This has been gathered from my own work in the field.

All this, in the face of evidence that the interdict process is disintegrating, fuelled a suspicion that one, or perhaps several, of these problems is responsible. Consequently my questionnaire seeks, if breakdown is indeed occurring, to isolate the procedural problem primarily to blame.

2.2.4.2 The Interdict as a Violation of Audi Alteram Partem

As noted above, the Act has been widely interpreted as providing for the grant of a final interdict on the ex parte application of the survivor. This has precipitated an outcry over the fact that the respondent has no opportunity to be heard before the interdict is granted against him. His right to audi alteram partem, now enshrined in the Constitution, is thus violated.[95] This argument was accepted in two recent Supreme Court decisions.

The first was *Rutenberg v Rutenberg.*[96] Mrs Rutenberg, had been granted a family violence interdict and her husband had brought an application to have it set aside. Both parties appeared in court for the hearing of this application. Mrs Rutenberg's attorney raised two points in limine. He submitted that the proceedings should be held in chambers rather than in open court, and objected to the Magistrate's proposal to hear oral evidence. Both points were dismissed. Mrs Rutenberg's attorney took this ruling on review and thus the case of *Rutenberg v Rutenberg.*

Thring J, who heard the matter, was thus merely required to rule on the two points in limine. He was however, so disturbed by family violence interdict that he proceeded to pronounce on the process in its entirety. Assuming the family violence interdict to be final in nature, he pointed out that it is not the normal practice of our courts to grant final interdicts ex parte. The normal practice is for a rule nisi to issue calling on the respondent to appear in court on the return day. This affords him an opportunity of being heard before the interdict is made final. The Prevention of Family Violence Act, he said, turns this normal procedure on its

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95 See for example Dicker "Prevention of Family Violence Act: Innovation or Violation?" *De Rebus* (1994) 212; Fredericks and Davids "The Privacy of Wife Abuse" *S A Law Journal* (1995) 471 and Stewart "Family Violence Act Causes 'Nightmarish' problems" *De Rebus* (1994) 721.

96 Supra n 12.

head with potentially grossly inequitable results for the respondent. This gross inequity resides mainly in the radical departure from the audi alteram partem rule, a fundamental tenet of natural justice, but also in the fact that the respondent is saddled with the onus if he brings an application to have the interdict set aside. This is in contrast to the normal return day procedure which places the onus on the applicant. "This being so", said Thring J,

> "it seems to me that the legislature must be taken to have intended that procedure to be used very sparingly, and only in those cases where a departure from the ordinary procedure is clearly justified in the circumstances of the particular case."[97]

Otherwise, and generally, Magistrates should simply apply the ordinary court rules. They may either decline to grant the interdict ex parte and instruct the applicant to proceed by way of notice, or they may issue a rule nisi in terms of Magistrate's Court Rule 56(5)(a).

Next, in the Witwatersrand Provincial Division came the case of *Robinson v Rossi.*[98] Unlike Thring J, Stegmann J was required to pronounce on the interdict procedure in its entirety. The issues to be decided were whether the judge in chambers had correctly granted the interdict and authorised the warrant of arrest in terms of the Act and whether the respondent was entitled to an interim interdict silencing the applicant.

As Thring J, Stegmann J was thoroughly disconcerted by the family violence interdict. Immediately after outlining the provisions of the Act he expressed the view that:

> " . . . these procedures are capable of abuse by a spouse who merely pretends to be a victim, and who is motivated by anger, spite or malice, to procure the temporary imprisonment of the other spouse."[99]

He then began his interpretation of the procedure under the Act:

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97 Ibid at 49.

98 Supra n 12.

99 Ibid at 357e.

> "On receiving an application for an interdict a judge's first duty is to consider whether a prima facie case has been made out for the proper use of his power under the Act to grant a summary interdict ex parte. In considering this question, he will bear in mind that if he should decide to grant an interdict he will not be able to stop there: he will be compelled by section 2(2) to authorise a warrant for the arrest of the respondent, and he will thereafter have lost control of the further fate of the respondent."[100]

Throughout his judgment Stegmann J offers graphic descriptions of the further fate of the respondent:

> "He is secretly delivered into the hands of the applicant until she chooses to strike at him . . . by the simple expedient of producing an affidavit to the effect that [he] has breached one of the terms of the suspension of the warrant and handing that affidavit to a policeman."[101]

The respondent is thus condemned to "capricious curtailment of is freedom at the instance of the applicant."[102] The respondent's ghastly fate renders it:

> "of utmost importance that the judge or magistrate act with great caution before exposing a respondent to the risk of deprivation of his freedom in circumstances in which his side of the story has not been heard."[103]

A judge or magistrate should only grant the interdict in terms of the Act if:

> "he is satisfied that there is good reason to believe that giving prior notice to the respondent would be likely to precipitate the evil which the applicant seeks to avert, or something equivalent to it."[104]

Otherwise, ruled Stegmann J, as Thring J before him, judicial officers should simply follow the ordinary court rules.

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100 Ibid at 364h.

101 Ibid at 372f.

102 Ibid at 372i.

103 Ibid at 365a-b.

104 Ibid at 365e.

As Thring J, Stegmann J was also disturbed by the fact that the Act places the onus on the respondent to initiate and prove a challenge to the interdict. This was another of its "draconian"[105] features. Stegmann J therefore ruled that where the respondent applies to have the interdict amended or set aside the applicant continues to bear the onus of proof.[106]

Stegmann J went on to give the respondent a choice of procedures with which to challenge the interdict. Either he could bring a court application in terms of rule 6 of the uniform rules or he could use the 24 hour notice procedure created in the Act. Thring J ruled in the same way. He held that where judicial officers choose to apply ordinary court procedure, either notice or a rule nisi, "the procedure provided in section 2(2)(c) of the Act for amending or setting aside the interdict would simply be an additional remedy open to the respondent."[107]

The effect of these decisions is to deprive the Prevention of Family Violence Act of all meaning. Together they rule that the ordinary court rules are generally applicable to domestic violence cases. Applications should be made on notice or, in urgent cases, on an ex parte basis in which event a rule nisi will issue. The applicant is burdened with the onus of proof throughout. These judgments even give the respondent an extra edge. In addition to being able to defend himself in terms of ordinary court rules, they give him a choice of procedures with which to challenge the interdict. He can either launch an attack in terms of rule 6 of the Uniform Rules of Court or use the truncated procedure created by the Act. Indeed the respondent's challenge to the interdict on 24 hours notice to the applicant and the court is practically all that survives of the Act.

Thring J and Stegmann J do not consider domestic violence a serious issue. Stegmann J for instance refers to it as a "tempestuous relationship."[108] Nor do they consider domestic violence to be inherently urgent. Thring J minimises the urgency of the problem. He concedes

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105 Ibid at 372g.

106 Ibid 375f-h.

107 *Rutenberg v Rutenberg,* supra n 12 at 50

108 *Robinson v Rossi* supra n 12 at 366j.

that "In many applications . . . there will be genuine urgency present [but] this will not always be the case."[109] In support of this he offers the following far fetched example:

> "the respondent may, for example, be in another part of the country when he or she utters the threat to harm the applicant when he or she returns to their common home at some time in the future."[110]

Stegmann J sees no particular urgency in domestic violence. In ruling on the manner in which the ordinary court rules should henceforth be applied, he says that notice is required where "the matter does not appear to be of greater urgency than most matters on the ordinary motion roll."[111] "If the matter appears to be of some urgency,"[112] the judicial officer may consider issuing a rule nisi.

Thring J and Stegmann J's obliviousness to the seriousness of domestic violence explains their disconcertion at the Act's novel interdict procedure. While these judgments have acquired fame, or notoriety, for holding the family violence interdict to be a violation of audi alteram partem, this was not the only issue, nor, it is submitted, the primary issue, which disturbed the judges. Both Thring J and Stegmann J were vexed at the respondent bearing the onus of challenging the interdict. For Thring J this was "potentially grossly inequitable,"[113] Stegmann J castigated it as a "draconian"[114] feature of the Act. What most violated Stegmann J's sense of justice was not the breach of audi alteram partem, but the fact that the interdict renders the respondent liable to arrest on the applicant's word. His distress in this regard runs like a thick cord through the judgment. While this already been referred to above, it is worth quoting this rather lengthy paragraph in order to make my point clear:

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109 *Rutenberg v Rutenberg* supra n 12 at 43.

110 Ibid at 43-44.

111 *Robinson v Rossi* supra n 12 at 365h.

112 Ibid at 365i.

113 *Rutenberg v Rutenberg* supra n 12 at 44.

114 *Robinson v Rossi* supra n 12 at 372g.

> "The freedom of the [respondent] will, apparently for the rest of his life, be at the mercy of the spouse who initially obtained the interdict and the warrant of arrest on an *ex parte* basis. That spouse, holding the whip in hand, will be free at any future time, day or night, by merely producing to a policeman an affidavit containing allegations to the effect that the interdicted spouse has conducted himself in a manner which amounts to a breach of one of the conditions of the suspension of the warrant of arrest, be in a position to have the interdicted spouse arrested and detained in custody for up to 24 hours, without the need for any further judicial authorisation of this invasion of his liberty, and without the opportunity to contest the allegations against him. This state of affairs appears to me to be intolerable."[115]

The ex parte grant of the interdict is merely referred to in passing. What clearly unnerves Stegmann J is the fact that the fact that the respondent is liable to arrest at the applicant's caprice. Though both judges tend to cloud this through their uncharacteristic use of non sexist language, they do perceive the applicant spouse as female and the interdicted spouse as male. Both judgments are contaminated by assumptions of maliciousness on the part of female applicants and corresponding innocence on the part of male respondents.

My point is that the judges' trivialisation of domestic violence caused them to be affronted at the family violence interdict and to circumscribe it out of existence. If they had taken domestic violence seriously they could have considered whether, assuming the interdict to be a violation of audi alteram partem, it was nevertheless justified in terms of the Constitution's limitation clause by the rights to bodily integrity and gender equality.[116] There is certainly a powerful argument to be made in this regard in view of the emergency character of domestic violence, the primacy of the equality clause in our Constitution and the limited attenuation of the respondent's due process rights which the interdict involves. He is not, after all, denied a hearing absolutely. His right to be heard is simply delayed until after the interdict had been served on him, whereupon he may, at any time, on 24 hours notice to the Court and the applicant apply for the interdict to be amended or set aside.

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115 Ibid at 370i-371a.

116 The right to freedom from violence from private sources cannot be relied on in this context, since it was not part of the Interim Constitution which governed these decisions.

All this however assumes the interdict to be final. If it were interim, it would violate audi no more than do all interdicts granted ex parte in South African law.

Karin Lehmann's voice in the wilderness has sparked a new dialogue in this regard. She has argued that the family violence interdict is in fact interim in character:

> "The hall-mark of a final order is, after all, that it disposes of the enquiry, for it is based on a final determination of the rights of the parties, as a result of which the court is functus officio, and the order only contestable by way of appeal or review. Exceptionally, the court may amend or set aside its order where there has been a change of circumstances subsequent to the granting of the order. This is not the case here. Under the Act the respondent may apply for the amendment or setting aside of the interdict as of right, not by way of exception. The respondent's application will moreover ordinarily be in the nature of a response, in which the respondent disputes the applicant's version of events. It is not a substantively new application in the sense commonly understood, in which a set of facts distinct from the original application is for the first time raised. It is moreover apparent from Rule 5(6) of the regulations to the Act that the application for the setting aside of the interdict entails a re evaluation of the original application. How then can it be said that the family violence interdict is final? If one wishes to characterise the interdict using traditional nomenclature, it is surely more accurate to characterise the interdict as analogous to an interim rather than a final interdict."[117]

Lehmann points out that the only real difference between the family violence interdict and the conventional interim interdict is that the former is granted without the adjunct rule nisi and automatic return day.[118] The fact however, that there is no automatic return day and that the respondent must assume the inconvenience of setting the matter down for hearing is not sufficient to alter the interim character of the interdict.

Thring J and Stegmann J could then, if they had been less alarmed at the Act, have found the interdict to be interim in nature. This of course involves no compromise of audi alteram partem and would have accorded with their duty to interpret legislation in conformity with both the Constitution and existing law. It was not however, only the purported violation of

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117 Lehmann, Comment on Rutenberg v Rutenberg CPD Case No 912/95, unreported *S A Journal on Human Rights* (1997) 154 at 156-157.

118 Ibid at 157.

audi that disturbed the judges. The respondent's onus was a particularly vexing issue for them. Yet this is also an assumption. Lehmann points out that they could just as easily, and more persuasively, have found that the onus remains with the original applicant. The fact that the Act requires the respondent to apply for the setting aside of the interdict does not compel the interpretation that he bears the onus at the hearing of the application. Lehmann argues that:

> "The procedural innovation introduced by the Act is one of form, and does not alter the substantive roles of the parties."[119]

Thring J and Stegmann J could have interpreted the family violence interdict in a way that allowed it to retain some meaning. Alarm, however, at a remedy stacked in favour of female applicants, overwhelmed them and precluded a careful consideration of the law.

On the ground the effect of these decisions has been dramatic. The family violence interdict has been flung into a state of utter confusion.

Despite these judgments, some judicial officers continue to follow the provisions of the Act, granting abused women family violence interdicts on an ex parte basis. Many however, now follow ordinary court rules, granting either interim interdicts with rules nisi, sometimes on an urgent basis, sometimes not, or, mandating lengthy application proceedings.[120]

While ordinary application proceedings in this context have been scathingly criticised,[121] there appears to be an assumption that whether abused women are granted family violence or

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119 Ibid.

120 This has been revealed through my work in the field.

121 See for example Lehmann supra n 117 at 158.

interim interdicts does not really make a difference.[122] The difference, it is submitted, is enormous.

Although the interim interdict will also enjoin the respondent from abusing the applicant what if the respondent breaches the interdict? If the applicant has a family violence interdict, her remedy is certain and capable of almost immediate enforcement - the execution of the warrant of arrest. But what if she has a rule nisi with an interim interdict which is breached prior to the return day? It has been suggested that the applicant may anticipate the return day. The provisions of the Magistrates Courts Rules, however, entitle only the respondent to do so, on 12 hours notice to the applicant. The possibility of a summary conviction on motion proceedings, instituted by the applicant, as exists in the Supreme Court, is not available in the Magistrates Courts. Lehmann concludes that the only remedy available to the applicant appears to be that of committal for contempt of court under s 6 of the Act, the effect of which corresponds with s 106 of the Magistrates Court Act.[123] She notes however that:

> "This section creates a statutory offence for which the respondent may be convicted only after the prosecution of a separate criminal trial, which would in most cases take place only after the interdict application has long been disposed of."[124]

It has been suggested that if Magistrates authorise conditional warrants of arrest with the issue of rules nisi, then the protection afforded by interim and family violence interdicts will be identical.[125] Evidence, such as there is, reveals that Magistrates are not doing so.[126] It

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122 The S A Law Commission does not appear to see a difference in this regard see supra n 11 at 6-23, nor does the excellent submission to the Law Commission by the Community Law Centre (University of the Western Cape); Rape Crisis (Cape Town) and the ANC Parliamentary Women's Caucus. *Violence Against Women in Relationships: Submissions to the South Africa Law Commission in the Light of International and Constitutional Human Rights Jurisprudence* (1997).

123 Lehmann supra n 117 at 159.

124 Ibid.

125 Ibid.

126 This I have gleaned from my work in the field. Specifically, Tshwaranang Legal Advocacy Centre to End Violence Against Women circulated a letter to Magistrates around the country,

appears that they consider authorising suspended warrants only if the interdicts are made final on the return day. Lehmann is of the view that they are not even entitled to do this.[127] She says that where judicial officers apply ordinary court rules they are acting in terms of either the Magistrates or the Supreme Court Act and consequently lack the power to authorise a warrant of arrest at any stage of the process. Only the Prevention of Family Violence Act entitles them to do this.

We are faced then with an iniquitous situation on the ground. For no reason other than the whim of the judicial officer, some survivors are being granted family violence interdicts which secure them immediately enforceable legal protection. Others are receiving interim interdicts which leave them entirely unprotected unless and until confirmation on the return day. Clearly this situation cannot be permitted to prevail. The South African Law Commission has offered the following solution:

> "It is submitted that the inherent drawbacks to *ex parte* orders and criticism that the Act is an unjustified departure from the *audi alteram partem* principle, would be allayed by providing for the granting of interim interdicts *ex parte* and a rule *nisi* calling upon the respondent to show cause on the return day of the order why the provisional interdict being granted against him should not be made final. On the return day, the respondent bears no onus: it is for the applicant to persuade the court that he or she should be granted final relief. In all the jurisdictions considered orders made on application without notice are temporary orders."[128]

It is not clear from the text quoted above, or from the Commission's report in its entirety, whether it contemplates the authorisation of conditional warrants with the grant of rules nisi. One assumes that it does not, for the attack on the family violence interdict as a breach of audi, which the Commission accepts, is founded not only on the fact that the respondent is denied a hearing but on the severity of the consequences which may befall him in the absence

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requesting from them the procedure that they are following with respect to family violence interdicts. Their replies stated that they are authorising conditional warrants of arrest only on the return day.

127 Lehmann supra n 117 at 159-160.

128 S A Law Commission Discussion Paper 70 supra n 11 at 22-23.

of a hearing. It is submitted that an interim interdict without a warrant of arrest is not an acceptable option for battered women, since it leaves them in danger without enforceable legal protection unless and until confirmation.

Even however, if the Commission does intend suspended warrants to be issued with rules nisi, its proposal remains unsatisfactory. The interim interdict option, whether or not bolstered by a warrant of arrest, is inferior to the current family violence interdict. Our mission is surely to improve the protection offered by the current system not dilute it. The pitfalls of the interim interdict option are the following: An automatic return day will double the current procedure in terms of court time. In view of the enormous number of women using this remedy and the fact that our Magistrates Courts are already overburdened, this will be unmanageable. An automatic return day will expose survivors to pressure from their abusers to desist from their action, a hazard which the current process minimises. Return day hearings are akin to full trials. This will render the process more expensive and cumbersome than is the case with the current summary enquiry, to the detriment of both survivors and our overburdened courts. Trial like proceedings, moreover, raise the spectre of secondary victimisation to which domestic violence survivors are especially vulnerable. This peril is averted in the current system. Finally, ordinary return day procedure places the onus on the applicant to persuade the court that she is entitled to final relief and this is indeed what the Law Commission proposes. This will reinforce rather than diffuse the disadvantage which survivors labour under by virtue of both their gender and the peculiar cruelties of domestic violence. Consequently the process will be less effective than it is under the current family violence interdict. With a view to bolstering rather than diluting the current system, I will counter the Law Commission's recommendation with a proposal of my own:

Following Lehmann's lucid argument, it is submitted that the family violence interdict is interim rather than final in character. It consequently involves no breach of audi alteram partem. It should be maintained and re termed "interim" in order to reflect its true nature. The respondent should continue to bear the onus of initiating and proving a challenge to the

interdict. If he fails to do so within a fixed period of time, the interdict should become final by operation of law.[129]

Whether the respondent's challenge to the interdict results in a summary enquiry or something closer to a full trial is not of critical importance in these circumstances. This is so because such enquiry will not be inevitable (indeed experience under the current system suggests that it will not occur very often) and because the respondent is burdened with the onus of proof.

My proposal involves two departures from conventional interdict procedure: It dispenses with the automatic return day and it burdens the respondent rather than the applicant with the onus of proof. Both these innovations favour female applicants. It is submitted that this preference is justified as a substantive response to the inequality which generates domestic violence. Both these measures respond specifically to the nature of domestic violence. Dispensing with the automatic return day is necessary to save survivors from the hazardous waiting period during which they are susceptible to pressure from their abusers to desist from their action. Placing the onus on the respondent to initiate a challenge to the interdict further assists in this aim. Burdening the respondent with the onus of *proving* a challenge to the interdict is necessary to alleviate the domestic violence survivor's peculiar vulnerability in trial situations. These innovations also respond to South Africa's exigencies by placing minimum strain on our courts while simultaneously creating a legal remedy with some potency to compensate for our insufficiency of measures against domestic violence. Notably the Law Commission, in its proposal, places significant reliance on the fact that family violence interdicts abroad are generally temporary (in the conventional sense). The effectiveness of such interdicts, however, is inseparable from the networks in which they are embedded. Moreover many countries are blessed with court systems under considerably less strain than ours. Excessive significance cannot be attached to the fact that family violence interdicts

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129 This is in fact the position in New Zealand. The domestic violence protection order is initially a temporary one but becomes final by operation of law three months after the date on which it was issued if it is not successfully challenged by the respondent. Domestic Violence Act 86 of 1995, section 13.

abroad are generally temporary in nature. In South Africa we need to fashion a legal remedy that responds practically to an urgent problem in the face of severely limited resources.

As stated above, one of the primary aims of the questionnaire was to examine how many women are being granted family violence as opposed to interim interdicts and to examine the implications of this difference. It is to the questionnaire results that I now turn.

CHAPTER 3

EMPIRICAL EVIDENCE OF THE FAMILY VIOLENCE INTERDICT'S OPERATION

3.1 Approach

My questionnaire's purpose was to gain insight into the effectiveness of the family violence interdict as a legal remedy. Many negative reports however, caused me to be somewhat pessimistic in this regard and so I structured the questionnaire to achieve two specific goals. First, in the light of evidence that the process is breaking down, I sought to establish whether this is so, and if it is, to discern the point at which this occurs. In view of the string of procedural problems that have been identified with the process, my suspicion was that one, or perhaps several, of these is responsible for the reported collapse of the remedy. In order to achieve this goal my questionnaire tracks the interdict process from the application stage to the conclusion of the summary enquiry for contravention, honing in on the process problems, such as the sheriff's fee and police reluctance to arrest, identified by workers in the field and set out above. The questionnaire's second goal was to establish how many women are being granted interim as opposed to family violence interdicts and to explore the implications of this difference. In order to achieve this goal women were questioned on whether they were granted a "final" or an interim interdict, and if the latter, how long they had to wait for the return day and whether they suffered further abuse during this period. At the end, the

implications of this difference are examined by comparing the effectiveness of the process in respect of the two types of interdict.

Because my questionnaire tracks the interdict process, the results will be presented in several chronological stages from the initiation of the interdict application to the conclusion of the summary enquiry for its contravention. This allows me to identify problems and offer suggestions for reform throughout. The focus remains however, on the overall effectiveness of the remedy and the two specific goals set out above. Once my presentation reaches the conclusion of the interdict process, these main aims will be scrutinised in the light of the overall results. The conclusions reached will be examined against the requirements for an effective legal response to domestic violence and proposals for reform constructed accordingly.

The questionnaire was a combination of closed questions and requests for personal comment. Though small, my sample does justify quantitative analysis and so the results will be examined in this fashion. Where the bare statistics will be enhanced thereby, quotations from survivors will also be presented.

3.2 Sample

The questionnaire was completed by 60 survivors, 30 in Gauteng and 30 in the Western Cape. This sample was gathered through seven NGOs whose staff assisted survivors to complete the questionnaire. All of these NGOs are specialist service agencies for abused women, providing shelters or counselling services and legal advice. Some provide all of these. I have not established how many women in this sample had sought refuge in shelters, how many had sought counselling and how many legal advice. It may be that the survivors in this sample, because they sought specialist assistance, have suffered more severe abuse than is typical. This may be particularly so in respect of those survivors who had taken refuge in shelters. On the other hand, their contact with these NGOs meant that 76% of these survivors benefitted from specialist assistance in making their interdict applications. Such a wealth of aid and support may mean that the survivors in this sample experienced the interdict process more

positively than the typical survivor who does it (or should be able to do it) alone. In view of what follows, this is somewhat alarming.

Though this was not anticipated, the questionnaire results turned out to be dramatically different in Gauteng and the Western Cape. This is intriguing, and, since the equal size of the samples in the two regions lends itself easily to this, these results will be compared where they are significantly different.

Within the broad regions of the Western Cape and Gauteng, survivors were from a wide range of areas. In the Western Cape survivors lived in Athlone, Tableview, Belhar, New Cross Roads, Nyanga, Mitchells Plain, Khayelitsha and Atlantis. In Gauteng survivors lived in Auckland Park, Soweto, Eldorado Park, Lenasia, Pretoria and Mamelodi. This wide range benefits the sample by giving it a random character.

3.3 Survivor Profile

A survivor profile may be gathered from the biographical data submitted by the abused women in this study:

Their average age is 35.

They have an average of 3 children each.

67% are married. The majority of the remainder are separated or divorced. A handful are living with or dating their abusers.

Less than half of the women - 47% are employed.

63% of survivors had taken legal action against their batterers prior to applying for this interdict. Such action consisted in the main of laying assault charges and obtaining peace

orders. Many women had taken both these steps. Two women had obtained Supreme Court interdicts and three women had previously, unsuccessfully, applied for this interdict.

The fact that majority of these women are married, have an average of three children each and average at 35 years of age, reveals that most have been married for a substantial period of time. That the majority of these women have previously taken legal action against their partners reveals a history of abuse. Less than half of these women are employed. We are faced then, in the main, with women suffering the trauma of sustained abuse in an established intimate relationship, women who are not financially self sufficient, women, in a singularly impoverished position.

3.4 Application for the Interdict

Survivors were asked whether they received any explanation or assistance from court personnel in making their interdict applications. 52% answered *no.* This high figure is possibly explained away by the aid that was provided by NGOs, rendering assistance by court personnel nugatory. Nevertheless, this figure would seem excessive enough to warrant further investigation.

As stated above, concern has been expressed about the willingness of Magistrates to grant family violence interdicts at all. Their lack of understanding of the problem, coupled with the absence of a definition of domestic violence in the Act, or any guidelines as to the grounds on which interdicts should be granted, does not bode well for zealousness on their part. This study does not examine this issue as it deals only with survivors who were granted interdicts. Nevertheless this study reveals that while granting interdicts Magistrates are, in many cases, failing to treat this violence with the seriousness, or survivors with the respect, that is deserved. 38% of survivors in this study felt that Magistrates did not take their interdict applications seriously. They reported that Magistrates were impatient and belittling and tended to trivialise their abuse.

The Act's absence of any guidelines as to the grounds on which magistrates should grant interdicts has also caused concern that a high standard of proof may be demanded of applicants in practice. The shame and isolation in which battered women are trapped means that they frequently do not have medical or police reports to submit in support of their applications. A high standard of proof will thus render the remedy inaccessible to many survivors in urgent need of it. In an attempt to get a sense of the type and quantity of evidence required of applicants, the women in this study were presented with a list of types of evidence and asked to indicate those that they had submitted. Only 38% of applicants were granted interdicts on the strength of their personal affidavits alone. The remaining 62% had further evidence: 28% backed their personal affidavits up with police reports, 7% with medical reports, *20% with police and medical reports* and 7% with letters of referral from NGOs. Because this study deals only with women whose interdict applications were successful, it is not possible to correlate the granting versus refusal of interdicts with the degree of proof presented and reach any clear conclusions in this regard. It is noteworthy however, that 62% of this sample presented more evidence than a personal affidavit.

The assessment of the application stage of the interdict process is somewhat bleak. While the low incidence of assistance from court personal is possibly explained away by the help that was provided by NGOs, the other results are disturbing. 38% of survivors felt that magistrates did not take them seriously and 62% presented more proof than a personal affidavit. These results underline the need for a definition of domestic violence, linked to clear guidelines for the grant of interdicts, as well as judicial training on the nature of the problem.

3.5 Family Violence or Interim Interdicts

As noted above the *Rutenberg* and *Robinson* judgments have caused many judicial officers to decline to grant family violence interdicts and to proceed instead by way of ordinary court rules. *In this study only 38% of applicants were granted family violence interdicts. The majority - 58% were granted interim interdicts with rules nisi.* Further, 3% were refused interdicts ex parte and instructed to proceed by way of notice. The Western Cape and

Gauteng results were however, dramatically different in this regard. In the Western Cape a mere 7% of applicants were granted family violence interdicts. 90% were granted interim interdicts and 3% were instructed to proceed by way of notice. In Gauteng, by contrast, 70% of applicants were granted family violence interdicts. 27% were granted interim interdicts and 3% were required to follow notice proceedings. The reasons for this marked difference between the two regions are unclear. The explanation could lie in the fact that the *Robinson* judgment in Gauteng was handed down more recently than its counterpart in the Western Cape. Magistrates in the Western Cape have, for some time, been bound by Thring J's ruling in the *Rutenberg* decision. The few rules nisi granted in Gauteng could be just the tip of iceberg set afloat by the *Robinson* judgment.

In this study, survivors who were granted family violence interdicts waited for an average of 7 hours before receiving them.

By contrast, survivors who were granted interim interdicts waited an average of 28 days for the return day.

As set out in Chapter 2, survivors who are granted rules nisi are in a precarious position prior to the return day. They have no conditional warrant of arrest and are unable to anticipate breach in terms of Magistrates Courts Rules. If they are abused again before the return day, as 51% of the survivors in this sample were, they are simply without legal protection.

This study throws into sharp relief the iniquitous result of the rulings of Thring J and Stegmann J: Some survivors are receiving enforceable legal protection within a mere 7 hours while others are having to wait a month for (possibly) the same relief. In view of judicial understanding of domestic violence, this distinction is unlikely to be based on any real discrepancy in urgency. This is confirmed by the fact that 51% of survivors suffered further violence before the return day. Indeed, it was precisely ignorance of domestic violence which blinded Thring J and Stegmann J to its *inherent* urgency. In the result whether or not survivors are granted enforceable legal protection turns on the caprice of the presiding judicial officer.

As submitted in Chapter 2 the interim interdict, whether or not bolstered by a warrant of arrest, is inherently inferior to the family violence interdict. The results of this study bear out the arguments advanced in support of that submission. Survivors who received rules nisi waited an average of 28 days for the return day. Many women waited 60 or 75 days. In terms of the Magistrates Courts Rules, return days are required to be set 10 days after the issue of rules nisi.[130] That survivors actually waited triple this length of time is due to repeated postponements, either as a result of the incapacity of the courts or the cumbersome character of return day hearings, probably a combination of both.

Further deficiencies of the interim interdict option cited above were that it will expose applicants to pressure not to return to court and burden them with the onus of proof if they do return. *26% of survivors in this study did not get confirmation their interim interdicts.* Sometimes this was through failure to return to court and sometimes through inability to discharge their onus. One woman seemed to succumb to pressure from her batterer not to return to court. He reacted aggressively to service of the interdict and abused her again before the return day. She said

> "I could not have made it to go again to the court."

Many women named insufficient evidence as the reason for the court's failure to finalise their interdicts. An examination of the evidence that they had submitted revealed that none of their applications were founded on personal affidavits alone. All were corroborated by police reports or police and medical reports. This result highlights the inordinate difficulty battered women experience in the discharge of their onus.

3.6 Eviction Order

The Act is commendable for its recognition that evicting the abuser from the family home, even if he owns it, may be necessary in order to ensure the survivor's safety. Section 2(1)(b)

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130 Magistrates Court Rule 56(5)(a) read with rule 19(4)(b).

expressly authorises judicial officers to order the eviction of respondents. Lamentably, a wealth of evidence reveals judicial officers to be extremely reluctant to make these orders. This reluctance is confirmed by the fact that only 63% of survivors in this study who requested eviction orders were granted them. *All* the survivors whose applications for eviction orders were refused were abused again. This result speaks volumes on the necessity of these orders and underlines the need for judicial training on the nature of domestic violence.

3.7 Service of the Interdict

Three interdicts in this study were simply not served. Two women paid R 40 and R 47 respectively for service and are at a loss as to the reasons for the sheriff's failure to serve them. One survivor's interdict was not served because she could not afford the R 76 service fee. She was not informed of state financial assistance. All three of these women suffered further abuse. It is disturbing that this small sample sees the interdict process breaking down for three women at this elementary stage.

Overall the service fee averaged at R53. The amounts were not significantly different in Gauteng and the Western Cape. 71% of survivors claimed impecuniosity. A mere 29% were granted state financial assistance. These results confirm the concerns voiced about the sheriff's fee. The remedy lies in clear legislative specification of the circumstances under, and the manner in which, applicants may apply for the service fee to be borne by that state. A further possibility is to require the police to effect service in lieu of the sheriffs. This would involve no cost and would, one hopes, speed up the process. As noted below the time taken for service of the interdicts is unacceptably lengthy.

The average time for service of the interdict was 6 days. The Western Cape and Gauteng results differed markedly here. In the Western Cape the average service time was 9 days. In Gauteng it was 4 days. Given that the interdict is ineffective until served on the respondent and that many survivors face enormous danger at this time, this lengthy period is unacceptable. Indeed, 81% of survivors reported feeling unsafe during the time that their interdicts had been granted but not yet served.

At this point the questionnaire asked survivors about their abusers' reactions to service of the interdict. Abusers tended to display one of three reactions: they were aggressive, they were intimidated or they treated the interdict as a joke. I constructed categories accordingly. A few women reported no discernable reaction from their partners, or said that he was "quiet" or "calm." I thus created a fourth category which I have named "deadpan." *The majority of respondents - 60% reacted aggressively to service of the interdict. A paltry 20% were intimidated.* 12% treated the matter as a joke and 8% were deadpan. Substantially more abusers were intimidated, and less were aggressive, in Gauteng than was the case in the Western Cape. The results for the two regions were as follows:

In the Western Cape 68% of respondents reacted aggressively, 12% were intimidated, 16% treated the interdict as a joke and 4% were deadpan.

In Gauteng 54% reacted aggressively, 27% were intimidated, 8% treated the interdict as a joke and 11% were deadpan.

The following are typical examples of aggressive reactions to service of the interdict:

> "He was very angry and said that this was the worst mistake I had made in my life and that he was going to make my life unbearable."
>
> "He was very angry and said that I was a fool to think that he was scared of the law."
>
> "He was very angry saying that I am stupid and he will kill me. He said he'll show me not to mess with him. It got to the point where I actually felt that I was stupid to have applied for the interdict."

A paltry percentage of abusers were intimidated by the interdict:

> "He was scared to go to jail."
>
> "He was ashamed of himself."

"... When the days were coming nearer to court he tried to behave better. He also treated the children better."

A significant number of abusers treated the interdict as a joke. It is not possible to tell whether, once their amusement had subsided, they would become aggressive or intimidated. Many women said:

"He just laughed and didn't care. He thought it was a joke."

Where women reported no tangible reaction from their abusers, the abusers were classified as deadpan. These responses have an ominous ring to them but again it is not possible to tell whether the reaction will subsequently be one of aggression or intimidation:

"He was strangely calm."

"He was quiet."

In view of the fact that 60% of the abusers in this study reacted aggressively to service of the interdict, it is unsurprising that 73% of the survivors reported feeling unsafe at this time.

3.8 Violation of the Interdict and Police Response

The survivors' fear on service of the interdict, noted above, appears to have been well founded. *74% were abused again*. In the Western Cape the incidence of violation was as high as 86%. In Gauteng the figure was 62%.

86% of survivors reported violation of their interdicts to the police. In Gauteng 94% did so, in the Western Cape, only 79% did so.

64% survivors who reported breach said that the police did *not* take their complaints seriously. The results were equally dismaying for Gauteng and the Western Cape:

"They said they are not going to take my case because I am not bleeding."

"They said because I am not married they will not attend to my case."

"The police did not want to handle it. They found him drinking liquor and they drank with him and became friends with him."

"I feel that the police should really take women who has interdicts serious as me and my children could have been killed as he held us hostage in the house for three weeks."

"When I ran to the police station at night with my four year old son I was told to go back home and when my husband comes back I must phone the police."

A number of women who had been granted interim interdicts with rules nisi attempted in vain to have them enforced:

"They wanted a warrant of arrest. They did not give the case a second thought."

"They said I had applied for an interdict and there is no way they can help."

Unsurprisingly, in the light of atrocious police response, 61% of these survivors received no explanation from the police on how to proceed from this point. The process broke down here for a number of survivors who were ignorant of the fact that they had to complete an affidavit at this stage.

72% of survivors said that it was difficult for them to escape their abusers in order to get to the police station and report violation of their interdicts:

"He would not let me out of the house."

This reveals the folly of making the completion of an affidavit by the victims of abuse a necessary condition for the enforcement of the interdict. This needs to be abandoned in a

revamped Act and the police need to be empowered to arrest on reasonable suspicion of breach.

As stated above, concern has been expressed that traditional police attitudes to domestic violence coupled with the failure of the Act to mandate arrest for breach are resulting in this not happening in practice. The police attitudes revealed above foreshadow the confirmation of this fear. It is confirmed unequivocally by the fact that less than half of the abusers who contravened the interdict (and whose partners reported contravention) *were* arrested. Overall the figure was 42%. In the Western Cape it was 47%. In Gauteng it was a paltry 35%. This is clearly the most disastrous figure encountered thus far.

At best the police gave abusers a stern warning. Otherwise they claimed that abusers could not be found, accepted bribes or simply turned survivors away:

> "They said the case was over."

> ". . . my husband gave them money to protect him."

On the rare occasions when the police did arrest for breach, the process continued relatively smoothly.

93% of the men who were arrested were brought before court. One was released on a warning.

3.9 Summary Enquiry and Sentence

93% of the men who appeared in court and faced the summary enquiry were convicted of the offence of violation of the interdict. One was acquitted. As has been suspected the sentences are mild in the extreme:

31% were fined. The standard appears to be R 300. Only one abuser was fined in excess of this, an exorbitant R 1000.

38% were given suspended sentences, generally 3 months or 6 months suspended for 2 or 3 years.

23% were fined and given suspended sentences.

A single abuser was incarcerated. He was sentenced to 12 months, the maximum penalty under the Act. One is grateful for this since this man stabbed his wife with a screwdriver so that she was in a coma for 10 days and confined to a wheelchair thereafter.

62% of survivors felt that their abusers' sentences were *unsatisfactory*. These were some of their reasons:

> "Because I am scared of him and he knows it. I do not feel safe."
>
> "Because it was the second time and he still got a suspended sentence."
>
> "Because his parents afford to pay his fine."

Several survivors expressed anger over the fact that their abusers were punished for contempt of court rather than for the crimes that they had committed against them:

> "It's not fair. He was sentenced 12 months for contempt of court, but not for attempted murder."

This highlights the inherent difficulty with the civil response to domestic violence noted above. A salutary proposal which has been tabled in this regard is that abusers be charged with both contempt of court for violation of the interdict *and* the crime which their conduct constitutes.[131]

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131 Detailed proposals are tabled in this regard in the excellent submission to the S A Law Commission by the Community Law Centre (University of the Western Cape); Rape Crisis (Cape

54% of survivors reported that their abusers' sentences caused economic hardship for them:

> "[The fine] was paid with his salary so he couldn't give me money."

While relieved that he is behind bars, the imprisonment of the abuser who stabbed his wife with a screwdriver has placed her in dire financial straits:

> "I am receiving a disability grant of R270,00 for three school going children. I have a house and debts which I cannot cover."

This result underlines the need for strategies aimed at reducing the detrimental impact of sentences on survivors. Restitution, for example, should be considered in lieu of fines.

Many women went beyond sentence and volunteered information about how the interdict itself caused them financial suffering. This generally took the form of their partner's spiteful withdrawal of support:

> "As soon as he received the interdict he made up his mind not to support us any longer."

To deal with this, a new Act needs to authorise the grant of temporary maintenance orders with interdicts.[132]

Of the survivors whose abusers were convicted and sentenced for violating the interdict, 46% were abused again.

In the end a mere 21% of the survivors who began this embattled process saw it through to its conclusion, and then almost half of these were abused again. The process is indeed disintegrating, every step of the way. Even when completed, it does not appear to be an

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Town) and the ANC Parliamentary Women's Caucus, supra n 122 at 38ff.

132 As suggested on page 40 and n 85 temporary access and custody orders should also be provided for.

effective deterrent. It is in the shadow of these rather despairing results that the questionnaire's main aims will now be scrutinised: Is the interdict effective? Where is the deepest pitfall in the process? What are the implications of granting an interim as opposed to a family violence interdict?

3.10 Effectiveness

I propose to consider the question of the interdict's effectiveness from four different angles. The first two are rather obvious. Did the interdict itself serve to deter further abuse? If not, did conviction and sentence for violation of the interdict end the abuse? The third angle is more intriguing. It examines the theory that the interdict is effective only in respect of a certain type of batterer, those, essentially, who are intimidated by the law. The fourth and final angle is provided by the survivors' evaluation of the process and throws the question of the interdict's effectiveness into entirely new relief.

Did the interdict itself serve to deter further abuse? Only 25% of the survivors in this sample reported this to be the case.

> "He realises that he can't abuse and threaten me any longer."

> "When he start with me after I got the interdict, I was phoning the police and he saw me and he quickly asked me not to call and he stopped and since then he is behaving good even when he is drunk."

Despairingly, even these few success stories may be premature due to the fact that these interdicts were obtained very recently. All the survivors in my sample completed the questionnaire from May to July of this year. They were asked when they had applied for the interdict. 42% had done so prior to 1997. 58% had done so during 1997. All the survivors, bar one, who reported that their partners obeyed the terms of the interdict, had applied for them *during* 1997. This makes it too soon to tell whether the current cessation of their abuse will have any lasting quality. The fact that almost half of my sample *did* apply for their interdicts

prior to 1997, but that 93% of survivors who reported that their interdicts were not violated, had applied for them this year, does not bode well for the remedy's long term effectiveness.

If the interdict was breached, did conviction and sentence end the abuse? The police aversion to arrest, revealed in this study, makes this question extremely difficult to answer. 58% of respondents who violated the interdict were *not* arrested and consequently never reached the summary enquiry and sentence stage. The number of abusers who were convicted and sentenced is so tiny that statistical analysis becomes meaningless. 13 abusers were found guilty and punished for contempt of court for contravening their interdicts. 7 of these did not abuse their partners again after this. In three of these cases however, survivors had applied for their interdicts during 1997, making it possible that their partner's desistence was merely fleeting. In four cases women had applied for their interdicts prior to 1997. It is only these four cases that can, with reasonable certainty, be classified as success stories. The numbers are tiny, but the tangible benefits for women on the ground cannot be ignored:

> "He abused me once after the interdict was in place and he was arrested and we went to court and he was found guilty. After this incident he has not abused me. There is peace in the home."

What of the theory that the interdict is effective only in respect of a certain type of batterer, those, essentially, who are intimidated by the law? This theory comes from Joanne Fedler, who, through counselling abused women, has devised a taxonomy for the classification of batterers.[133] She maintains that there are essentially three types of abuser:

Type A abusers

* never been to jail, law abiding in most respects.
* known to the outside world as a "gentleman."
* is a bully who won't fight back if confronted.
* batters when sober

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133 Fedler supra n 3 at 246ff.

Type B abusers

* has had brushes with the law and thinks he is omnipotent and nothing and no one can teach him anything.
* gets drunk and is known as being "unpredictable" and "volatile"
* might lose his temper if confronted and become violent.

Type C abusers

* has been in jail before or is on friendly terms with the local police.
* peace orders against him have been ignored or he has served periods of imprisonment for beating her up before.
* the beating gets worse with time
* suffers from a god complex and behaves as if omnipotent, telling her that she will never be able to do anything to him
* threatens that he will kidnap the children and she will never see them again.
* may have raped her.
* has friends in high places, is a prominent businessman, journalist, doctor, lawyer or other person of standing[134]

Fedler notes that the family violence interdict may well be effective in respect of type A abusers. In fact, the mere threat of an interdict may be sufficient to create the desired effect. Securing an interdict against category B and C batterers however, is unlikely to be effective. These men are not intimidated by the law and are likely to scorn an interdict or become enraged by it. Indeed in respect of type C abusers, Fedler advises against seeking an interdict at all, since it will only inflame an already volatile situation, possibly placing the woman's life in danger.

Though my questionnaire offers only very bald abuser reactions to service of the interdict, I thought it worth exploring them in relation to this theory. It will be recalled that more abusers reacted aggressively to service of the interdict, and less were intimidated, in the Western

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134 Ibid at 250, footnote 77.

Cape than was the case in Gauteng. In the Western Cape 68% of abusers reacted aggressively to service of the interdict while only 12% were intimidated by it. In Gauteng 54% reacted aggressively and 27% were intimidated. Interestingly, the differential incidence of violation of the interdict in the two regions accorded with these reactions. In the Western Cape the rate of breach was as high as 86%. In Gauteng it was a lower 62%. This correlation suggests that the interdict is significantly less effective in respect of the "fearless" type batterer than those who have some respect for the law, intimating support for Fedler's theory. A more direct analysis however, yields a different result. 74% of respondents who reacted aggressively to service of the interdict inflicted further violence on their partners and 60% of those who were intimidated did the same. This disparity is not of much significance in a sample of this size. Consequently my study fails to offer categorical proof of Fedler's theory.

What were the survivors views on the effectiveness of the interdict? In the final section of the questionnaire, survivors were asked whether they found it easy to obtain the interdict; whether it made them feel safer and whether it helped to stop the abuse. What is striking is that their answers reveal a considerably more positive evaluation of the interdict than was obtained through statistics of the remedy's success. Moreover the Western Cape and Gauteng evaluations are dramatically different.

Overall 67% of survivors said that they found it easy to obtain the interdict. In the Western Cape 50% of survivors reported finding the process easy. In Gauteng the figure was a rather fabulous 83%.

57% of survivors said the interdict made them feel safer. In the Western Cape the figure was only 37%. In Gauteng it was again a resounding 77%.

43% of the survivors said the interdict helped to stop the abuse, 33% in the Western Cape and 53% in Gauteng.

Overall the survivors' evaluation of the interdict is infinitely more positive than the statistics of the remedy's success admit. This reveals that while the not necessarily ending the abuse,

the interdict is nevertheless providing these women with tangible benefits. Perhaps their abusers show an inkling of intimidation. Perhaps the honeymoon phase is extended. Perhaps their self esteem is bolstered by the law's affirmation of their right to bodily integrity. Whatever its precise content, abused women are obtaining value from the interdict. This forbids us from discarding it.

While survivors in the Western Cape evaluated the interdict moderately, those in Gauteng gave it top marks. How is this drastic difference between the two regions explained? Interestingly, what emerges clearly as the deepest pitfall in the process: police failure to arrest, does not account for this. Police attitudes, in terms of whether or not they took survivors seriously, was not significantly different in the two regions. The actual incidence of arrest was in fact lower in Gauteng than it was in the Western Cape. The points at which the two regions differed markedly were as follows:

* Considerably more interim than family violence interdicts were granted in the Western Cape than was the case in Gauteng.

* The time for service of the interdict was longer in the Western Cape than it was in Gauteng

* More respondents reacted aggressively to service of the interdict in the Western Cape than was the case in Gauteng

* The incidence of violation of the interdict was higher in the Western Cape than it was in Gauteng.

These then, were the contrary features of the process in the Western Cape which conspired to produce a more negative evaluation of the interdict than was the case in Gauteng. Notably the family violence versus interim interdict issue features in this list. I shall return to this presently.

What may be concluded regarding the interdict's effectiveness? Statistically the conclusions are bleak. Only 25% of survivors reported that the interdict itself deterred further abuse. Whether conviction and sentence is more effective remains shrouded in mystery since the majority of violaters were simply not arrested. In the minuscule sample available, the abuse ended in 54% of cases. Despairingly, many of this handful of success stories may be premature. The survivors views on the interdict, however, throw its effectiveness into entirely new relief. Their positive assessment reveals that while not necessarily ending the abuse, the interdict is providing them with tangible benefits. That they consider it of worth is confirmed by the fact that, asked whether or not they thought the interdict should continue in existence, a resounding 78% answered in the affirmative. This forbids us from discarding the interdict. We are bound to improve it.

3.11 The Deepest Pitfall in the Process

This study reveals the family violence interdict to be fraught with snares, with only a handful of survivors hobbling to the conclusion of the process. It also reveals that the deepest pitfall, by some yards, is police failure to arrest. For 58% of survivors whose interdicts were violated, their legal protection disintegrated here. Legislation mandating arrest and police training are clearly necessary. In view however, of our reality: an overburdened police force rife with the trivialisation of domestic violence, it is doubted that these measures will be enough. Immediate arrest on breach is pivotal to the effectiveness of the interdict. It is therefore suggested that further administrative strictures be legislated. Police should be required to give written reasons for failure to arrest. These should be scrutinised by their superintendents at specified intervals. Superintendents would also need to be supervised. The Human Rights Commission or the Gender Commission could perform this function.

If these obligations on service providers are onerous, they are justified by the inequality which spawns domestic violence, inequality which our country is committed to combatting, and the urgency of effective legal action against domestic violence in South Africa.

3.12 Family Violence versus Interim Interdicts

The more positive assessment of the interdict in Gauteng compared to the Western Cape and the fact that family violence v interim interdicts was a major variable between the two regions, suggests that survivors found the former more effective. This hypothesis is born out be a comparison of survivor evaluations in respect of the two types of interdict:

79% of survivors who were granted family violence interdicts reported finding the process easy. Only 57% of those who were granted interim interdicts reported the same.

75% of survivors who were granted family violence interdicts said it made them feel safer. 45% of those who were granted interim interdicts said the same.

67% of those who secured family violence interdicts said it helped to stop the abuse. The interim interdict was reported as having this effect in only 43% of cases.

The explanation for this disparity lies partly in the fact that interim interdicts are granted without warrants of arrest, leaving survivors unprotected until the return day. This had brutal consequences for 51% survivors in this study. The absence of the warrant alone however, appears insufficient to account for the drastically different evaluations in respect of the two types of interdict. The remainder of the explanation must lie in the problems which bedevilled the interim interdict: the lengthy period that preceded the return day due to repeated postponements, and the fact that many survivors found it impossible to discharge their onus despite significant evidence of their abuse. As submitted above, these difficulties inhere in the interim interdict and will render it less effective than the family violence version. Consequently the current interdict should be retained and revamped. It should be re termed "interim" in order to reflect its true character. The respondent should continue to bear the onus of initiating and proving a challenge to the interdict. Failure to do so within a fixed period of time should render the interdict final by operation of law.

It is submitted that these departures from conventional procedure are necessary in order to respond effectively to a problem which is an emergency in our country. These innovations respond to the inequality which spawns domestic violence by diffusing the power imbalance between the parties. They respond to the nature of the problem by attempting to ameliorate some of the battered women's peculiar vulnerabilities, and, by creating a remedy with some potency which places minimum strain on our court's resources, they respond to South Africa's harsh reality. They therefore have some hope of being effective.

CONCLUSION

In South Africa, domestic violence is an epidemic which is spreading and festering in the face of the law's toothlessness. The only legal remedy we can offer abused women, remotely tailored to their plight, is the National Party's hastily crafted family violence interdict. Rather ironically, this remedy has turned out to be, in several important respects, more powerful than its counterparts abroad. Now, compounding the irony, the Law Commission would have us dilute its peculiar potency in the name of reform. Domestic violence in South Africa will not be controlled by wrenching legal remedies from rich foreign soil and implanting them in our country. Effective reform needs to have regard to what is happening on the ground, and in this light, construct improvements which respond to the cause and nature of the problem and the exigencies of our country. It is hoped that this small study and its limited aims have contributed to this project. The project is a daunting one, but necessary if we want to be able to prevent women like Helen from being escorted by the police into their homes each night, if, when they ask, "Isn't there anything the law can do for me?," we want to be able to answer something other than, "I'm sorry, no."

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